Supreme Court, U.S.
FILED
MAR 27 1992
OFFICE OF THE CLERK

No. 91-1569

IN THE

Supreme Court of the United States

October Term 1992

DR. DAMON HILL, JR., STEPHANIE HILL, KATHYL ANDERSON SANDRA SALAZAR AND DR. SAM SPIKES,
Petitioners

vs.

TEXAS EDUCATION AGENCY (LUBBOCK INDEPENDENT SCHOOL DISTRICT), ET AL,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented

Petitioners are parents of school age children denied intervention in the Justice Department's twenty year attempt to desegregate the Lubbock, Texas school system. The Justice Department has since voluntarily withdrawn from the case.

I. In denying Petitioners' Motion to Intervene,the district court erred in applying the unreasonable Fifth Circuit burden of proof

II. Party status should be granted on the grounds that changed circumstances warrant a reconsideration of intervention.

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DR. DAMON HILL, JR., STEPHANIE HILL, KATHYL ANDERSON, SANDRA SALAZAR AND DR. SAM SPIKES, Petitioners

V.

TEXAS EDUCATION AGENCY (LUBBOCK INDEPENDENT SCHOOL DISTRICT) ET AL, Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioners Dr. Damon Hill, Stephanie Hill, Kathyl Anderson, Sandra Salazar and Dr. Sam Spikes, respectfully pray that a

writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on December 30, 1991, which denied intervention to petitioners to the cause of the parties in chief, the United States Justice Department, and the Lubbock Independent School District. For clarity, reference to the petitioner is by "Hill"or "Petitioners" and reference to respondent is by "LISD".

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as United States v. Texas Educ. Agency (Lubbock Independent School Dist.), 138 F.R.D. 503 (N.D.Tex., June 11, 1991) (See Appendix A. The decision of the District Court is reported as United States v. Texas Education Agency, 952 F.2d 399 (5th Cir. 1991),(See Appendix B).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, entered December 30, 1991, is attached as Appendix A. This petition for writ of certiorari is filed within ninety days after the order. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1)(1988). Petitioners ask this Court to review this petition in order to resolve a conflict between this Court and the courts

of appeals under Rule 10.1(a) of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in pertinent part, as follows:

> Congress shall make no law ...abridging...the right of the people... to petition the government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any equal protection of the laws.

STATEMENT OF THE CASE

Proceedings and Result

This desegregation suit was originally filed by the United States Justice

Department on August 7, 1970. On May 3, 1988, after eighteen years of litigation, the United States District Court for the Northern District of Texas entered an order declaring the LISD to be unitary and provided that the court would retain jurisdiction for a period of not less than three years. Within the three-year period, in February, 1991, LISD filed a comprehensive reorganization plan, which changed the ethnic mixes of the school children and placed an undue burden on the minority communities by closing two minority secondary schools. On March 13, 1991, Petitioners filed their Motion to Intervene strongly contesting the new plan. (See Appendix B) The Motion to Intervene was recommended to be denied by the Magistrate on May 14, 1991 in his Findings of Fact, Conclusions and Recommendations. (See Appendix B) The

denial and findings were adopted by the district court on June 11, 1991. (See Appendix B) Petitioners appealed this ruling to the Fifth Circuit.

The Petitioners were found by the district court to have: (1) timely filed their Motion to Intervene; (2) an interest in the lawsuit; and (3) standing to have Intervenor status. (See Appendix B) However, the district court erred in finding that Plaintiff United States Justice Department adequately represented the interests of the proposed Intervenors. (See Appendix B) The district court incorrectly held that a presumption existed that the Petitioners were adequately represented and otherwise held them to a burden of proof which is contrary to the law. A hearing in August, 1991 on the Reorganization Plan was held with LISD and the Justice Department being the only

parties allowed to participate. On September 10, 1991 the district court ruled in favor of LISD, approved their Reorganization Plan over the arguments of the Justice Department, dissolved the injunctions and dismissed the case. The Justice Department filed its Notice of Appeal on November 18, 1991.

On December 30, 1991, the Fifth Circuit Court of Appeals affirmed the district court's judgment in this cause (See Appendix B) that Hill had satisfied the first three prongs of Fed.R.Civ.P 24(a)(2) but the Court of Appeals "observed that the fourth requirement had not been met", i.e., that "the applicant's interest must be inadequately represented by the existing parties to the suit" citing the harsh standard set forth in Bush v. Viterna, 740 F.2d 350, 354 (5th Cir. 1984). (See Appendix B)

On January 17, 1992, the United States Justice Department filed a Motion for Voluntary Dismissal in the Fifth Circuit, asking to be withdrawn from the appeal. This motion was granted on January 21, 1992. (See Appendix C). Petitioners requested the Fifth Circuit to allow them to proceed with the appeal after the Justice Department dropped their appeal but were denied. (See Appendix D).

FACT STATEMENT

LISD filed a desegregation plan and a Motion to Modify the plan on February 2, 1991, which made sweeping changes, including but not limited to the following: (1) The closing of Dunbar High School (a primarily black high school on the east side of Lubbock); (2) The location of a new junior high school (Cavazos) three blocks from Matthews Seventh Grade Learning Center (located in a predominantly

Hispanic neighborhood) and closing of Matthews as a junior high school; (3) Discontinuation of busing of grades one, two and six; (4) Adding Computer Science courses now presently available at the Estacado High School magnet program to all high schools in the city, thus diluting the Magnet program which promoted desegregation at the predominantly black Estacado High School; (5) Adding algebra and geometry in all junior highs at the eighth grade level further weakening the draw of the magnet junior highs; (6) Adding Advanced Placement classes at Monterey and Coronado High Schools which were previously only available at the minority magnet high school, (7) Granting Majority/Minority transfers only on the basis of program and space availability at any particular school ; (8) LISD's proposed plan for Cavazos Junior High will have a

segregative affect on that school. These eight points are in direct violation of the court orders in the case.

SUMMARY OF ARGUMENT

This school desegregation case originated between the Justice Department and Texas Education Agency (LISD). Parents of school age children sought to intervene and were denied. The Fifth Circuit denied intervention on the basis of its holding in Bush v. Viterna, citing a presumption of adequate representation by the Justice Department. The burden imposed by the Fifth Circuit is in conflict with both this Court's broader standard and Fed.R.Civ.P 24 as amended in 1966. Petitioners should have been granted intervention if the proper standard had been applied.

The Fifth Circuit's strict standard creates a presumption of adequate representation when one of the parties is a government agency. The broader standard stated by the Supreme Court in Trbovich requires only a minimal showing that movant may be inadequately represented. Trbovich v. United Mine Workers, 404 U.S. 528, 538, n.10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed. 686 (1972).

Had Petitioners been allowed to intervene in the proceedings below, their concerns over continued segregation in Lubbock schools could be finally resolved by allowing them to present evidence on the merits of the plan. As the Fifth Circuit recognized in their December 30, 1991 opinion (Appendix A, p.2), the merits of the desegregation case were not before that court. Denial of intervention and the subsequent appellate withdrawal by the

Justice Department has left unresolved issues over the LISD's modified desegregation plan. In their brief to the Fifth Circuit, the Justice Department spelled out the four points of disagreement with LISD's desegregation plan:

1) the conversion of Dunbar High School to a junior high school and the elimination of Dunbar's magnet programs,

2) the transfer of the Transitional Academic Achievement Program, in which mostly minority students are enrolled, from a predominantly white junior high school to a predominantly black school,

3) the transfer of Dunbar's minority students to another predominantly minority school, Estacado, without any specific plan for a magnet program to attract Anglo students; and

4) the elimination of transportation for desegregation purposes of students in grades 1, 2, and 6.

Unless Petitioners are allowed to be substituted as a party in this case now that the Justice Department has withdrawn, the rights of school children in Lubbock, Texas to desegregated school systems are denied.

ARGUMENT

I: The district court erred in applying the unreasonable Fifth Circuit burden of proof in denying Petitioners' Motion to Intervene.

Rule 24(a) of the F. R. Civ.P. requires intervention on a showing that (1) there is a timely motion to intervene; (2) the intervenor claims an interest in the proceeding; (3) the intervenor would be impaired or impeded by disposition of the action; and (4) the intervenor is not adequately represented by existing parties.

Fed.R.Civ.P. 24(a).[1] The first three factors were correctly decided in favor of Petitioners by the district court. Petitioners contend that the finding that the fourth prong of adequate representation was met is error.

This appeal concerns the burden of proof to be applied in evaluating evidence under the fourth prong, the question of adequate representation. The Fifth Circuit imposed an unreasonable unconstitutional burden, which is in conflict with this Court's precedents and the leading precedents in other Circuit Courts of Appeals. The district court's denial of intervention should be reversed because

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[1] These elements are questions to be decided by a fact finder. See Notes of Advisory Committee on Rules, 1966 Amendment to Rule 24

the district court applied the wrong standard in evaluating the evidence.[2]

The prior history of this case, leading to the instant petition, clearly shows the conflict between the interpretation of the adequacy of representation prong for evaluating intervention of right under Rule 24 (a). F.R.C.P. reached by the Fifth Circuit, other Courts of Appeal and this Court.

In the case at hand, intervention was denied Petitioners under the unduly strict

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[2] There are two types of intervention under Fed.R.Civ.P. 24. Fed.R.Civ.P. 24(a) allows for intervention of right upon a timely showing of 1) statutory right to intervention or 2) applicant has an interest in the subject matter of the action and the disposition of the action may impair or impede applicant's ability to protect that interest, unless adequate representation by existing parties. Fed.R.Civ.P. 24(a)

The second type of intervention is permissively granted either under 1) statutory right or 2) common question of fact or law. Fed.R.Civ.P. 24(b)

burden of Bush at 355 and Texas v. U.S. Dept. of Energy, 754 F.2d 550, 533 (5th Cir. 1985). This unfair burden creates a "presumption" of adequate representation if the government is a party and virtually requires an identity of interests between the intervenor and the government. The Fifth Circuit burden is in direct conflict with the more reasonable standard encouraged by the amendments to Rule 24 made in 1966 and as clarified by this Court in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 17 L.Ed.2d 814, 87 S.Ct. 932 (1967) and Trbovich at 538 n.10. Rule 24(a) was amended to overcome what was felt to be an overly restrictive approach toward evaluating Motions to Intervene by courts. See Notes of Advisory Committee on Rules, 1966 Amendment, *reprinted in* 28 U.S.C.A. Fed.R.Civ.P. 24 (1972)

This Court has provided further support for the adoption of a more reasonable approach to intervention. In Cascade, this Court indicated that Rule 24 should be broadly applied. Cascade , 386 U.S. 129.

As this Court set the standard in Trbovich, the burden on an applicant for intervention to show inadequate representation is "**minimal**". Trbovich at 538 n.10 (emphasis added).

In reliance on this precedent, a majority of the Courts of Appeal have used the Cascade/Trbovich standard of a **minimal** showing of inadequate representation to decide whether to grant intervention. In the Court of Appeals for the District of Columbia, there is a clear line of cases allowing intervention under this widely adopted standard. In Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), the

court allowed intervention to a group of parents of school age children after it was learned that the school board, previously charged with representing their interests, would not appeal. The Court cites Cascade, the 1966 amendments to Rule 24 and Nuesse v. Camp, 385 F.2d 694, 700 (D.C. 1967) for support.

Other circuits have applied the same minimal standard. Stotts v. Memphis Fire Dept.,679 F.2d. 579 (6th Cir. 1982) (minimal showing of inadequacy); United States v. American Inst. of Real Estate Appraisers, Etc., 442 F.Supp. 1072 (1977)(7th Circuit denied intervention of right using the Trbovich standard but allowed permissive intervention); Rios v. Enterprise Ass'n Steamfitters Local Union #638 of U.A., 520 F.2d 352, 357 (2d Cir. 1975)(intervention denied using Trbovich minimal standard, no "legally protectable

interest"). In the case at hand, the lower courts have held that parents had met the interest requirements.

A majority of courts of appeals have also allowed intervention under the broad minimum burden approach taken in Smuck v. Hobson, 408 F.2d 175 (1969), following Trbovich . This split between the broader Smuck interpretation of interest standard and the more burdensome intervention standard taken by the Fifth Circuit in Diaz v. Southern Drilling Corp., 427 F.2d. 1118, 1124 (5th Cir. 1970) was noted in Wright and Miller, Fed. Practice and Procedure §1908, p. 271-72 (1988).

The court in Diaz held that a property interest was needed in order to satisfy the "direct, substantial, legally protectable interest" required. *Id.* at 1124. However, the government in Diaz was asserting its statutory right to intervene under Internal

Revenue Code §7424 (1954) which is distinguishable because the court's motion under that statute does not implicate First Amendment rights to petition the Government, which is an issue under Fed.R.Civ.P. 24.

The Fifth Circuit mistakenly applied the *Diaz* burden in a school desegregation case, U.S. v. Perry Cty. Bd. Ed., 567 F.2d 277, 279 (5th Cir. 1978) where it expressly rejected the broader standard of Smuck. The court in Smuck had also acknowledged the need for a strong showing of interest by proposed intervenors. However, where the broader standard as evidenced by Smuck and the other courts of appeal differ is the weight to be given to the interest factor,which is not an issue in the cause, because of the finding by the district court and the Fifth Circuit. A distinction made by the court in Smuck is particularly

appropriate to the facts at hand. "To a degree it may well be true that a 'strong showing' is required to justify intervention after judgment. [citations omitted] But by the same token a failure to appeal may be one factor in deciding whether representation by existing parties is adequate." Smuck at 181.

The broader Smuck standard has been followed by most Courts of Appeal. U.S. v. American Tel. and Tel. Co., 642 F.2d 1285, 1291 (D.C. Cir. 1980)(intervention allowed under the "liberalized right to intervene in federal actions"); Morgan v. McDonough, 726 F.2d 11 (1984), *citing* Dowell v. Bd. of Ed., 430 F.2d 865, 868 (10th Cir. 1970)(liberal requirement of free intervention and withdrawal "so long as it does not seriously interfere with the actual hearings"). Petitioners, in the case at bar, assured the magistrate in the intervention

hearing that they would be ready to try their case in the hearing on the merits and would not cause any delay to the proceeding.

The Ninth Circuit in Johnson v. San Francisco Unified School District, 500 F.2d 349 (9th Cir. 1974) allowed intervention by a group of parents, citing Smuck and Trbovich. The Ninth Circuit relied on the minimal burden standard in Trbovich to reject the presumption of adequate representation by government officials stating "we cannot agree with the district court's conclusion that the school district, which is charged with the representation of all parents within the district and which authored the very plan which appellants claim impairs their interest, adequately represents appellants."*Id.* at 353.

Thus, the Fifth Circuit's holding in Bush v. Viterna requires an unduly

stringent showing of interest and adequacy of representation to demonstrate a right to intervene. The Fifth Circuit clearly has deviated from the broader interpretation of intervention under Rule 24 as amended in 1966 and as adopted by other Courts of Appeal and this Court.

Petitioners have demonstrated in the record on appeal that the interests they are asserting, were not adequately represented by the Justice Department. In fact, now that the Justice Department has dropped their appeal, they are not representing Petitioners' interests at all. (See Appendix C). In their Claim for Which Intervention is Sought, Petitioners listed six areas of concern where the Justice Department had not adequately represented their interests in the proceedings in the district Court. The

primary concern expressed by these six points was of continued segregation in the modified desegregation plan as evidenced by the anticipated racial composition of several schools by the proposed plan.

The Fifth Circuit, in its opinion, cited Bush as creating a **presumption** of adequate representation "when the party seeking intervention has the same ultimate objective." (Appendix A, p.3). Thus, the Fifth Circuit held that denial of intervention was appropriatejust because the Justice Department and Petitioners both desired desegregation in the local schools. This **presumption** clashed with the rule that the burden is **minimal**. Trbovich at 538, n. 10, Smuck at 175.

Throughout the history of the case there has been repeated need for intervention by community-based groups

representing the interests of minority, school-age children in Lubbock, Texas.

Both the opinions of this Court and those of a majority of courts of appeals follow the broader standard for intervention set forth in Rule 24(a). The stricter "presumption" of adequate representation by a government body as applied by the Fifth Circuit creates an unreasonable burden on proposed intervenors, defeating the intended purpose of the rule and denying Petitioners a meaningful right to assert their interests in the desegregation case at issue.[4]

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[4] Intervention is the most efficient means of asserting a school desegregation case if the United States is already a party. A citizen has a right to petition the government. U.S.Constit. Amend. 1 Due Process requires a forum to assert a claim. U.S.Constit. Amend. 5 and 14.

The four points of contention listed by the Justice Department in their brief represent only a fraction of the concerns expressed by Petitioners. Had Petitioners been allowed to intervene or to have input into the desegregation plan, the existing segregation could have been remedied by a more careful presentation of alternatives.

II: Party status should be granted on the grounds that changed circumstances warrant a reconsideration of intervention.

A mere disagreement between a party to the suit and the proposed intervenor over litigation strategy or over specific remedies or claims which should be asserted does not constitute any evidence of lack of capacity or insufficiency of representation of the proposed intervenors' interest by the Justice Department. *See* Bradley v. Milliken, 828 F.2d 1186, 1192 (6th Cir. 1987); Pierson

v.United States, 71 F.R.D. 75, 80 (5) (D.Del. 1976); Evans v. Buchanan, 130 F.R.D.306, 313 (3) (D.Del. 1990); Pate v. Dade County School Bd., 588 F.2d 501, 503 (5th Cir. 1979), *cert.denied* 444 U.S. 835; Perry Cty. Bd. of Ed., at 280

While differences in litigation strategy cannot be evidence of lack of adequate representation, this court has acknowledged the right of a party to intervene where knowledge of subsequent events will directly impact the party seeking intervention. In United Airlines, Inc. v. McDonald, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977), intervention was allowed after a decision not to appeal had been made by the class with whom the proposed intervenor had an identity of interest.

On January 17, 1992, the Justice Department filed its Motion for Voluntary

Dismissal (Appendix C) which was granted by the Fifth Circuit on January 21, 1992. Petitioners are thus foreclosed from further remedy because the Justice Department failed to pursue an appeal, unless this Court allows Petitioners either intervention or party status and remands the cause to the district court. The decision of the Justice Department to seek voluntary dismissal from the appeal is further evidence of the lack of diligence with which the Justice Department has represented the interests of the minority school children of Lubbock, Texas.

Where there are changed circumstances affecting the interests of the parties, intervention may be granted under limited conditions. United States v. Board of School Com'rs, Indianapolis, Indiana, 466 F.2d 573 (7th Cir. 1972) Petitioners submit that the voluntary

dismissal by the Justice Department warrants a reconsideration of the party status of Petitioners and does not constitute merely a difference of strategy. The interests of Petitioners no longer have **any** representation by a party to the case.

The original issues brought forth by Hill regarding the continued segregation of Lubbock schools are not resolved. In addition, the issues identified by the Justice Department as points of disagreement with LISD's Reorganization Plan relating to the continued segregation of the schools will not be presented to an appeals court for scrutiny. Therefore, Petitioners ask to be allowed to intervene or to be substituted as a party in this proceeding in order to protect their interests which were allegedly represented by the Justice Department, in producing and maintaining a desegregated school

system. As parents of school-age children, the District Court found that Petitioners have a significantly protectable interest as required in Donaldson v. United States, 400 U.S. 517, 531, 27 L.Ed.2d 580. 91 S.Ct. 534, 542 (1971) Petitioners argue that unless they are able to continue in this case as a party, this interest will go totally unrepresented.

CONCLUSION

For the reasons stated above, Petitioners pray that this Honorable Court grant this petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 91-1709
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

THE TEXAS EDUCATION AGENCY (LUBBOCK INDEPENDENT SCHOOL DISTRICT), et al.,

Defendants-Appellees,

VERSUS

DR. DAMON HILL, STEPHANIE HILL, KATHYL ANDERSON, SANDRA SALAZAR, and DR. SAM SPIKES,

Appellants,

Appeal from the United States District Court for the Northern District of Texas (CA5-806)

(December 30, 1991)

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge: [1]

In this school desegregation case pending for more than twenty years, the appellants appeal the district court's denial of their motion to intervene as of right under Fed. R. Civ. P. 24(a)(2). The merits of the desegregation case are not before us.

Following entry of a consent decree in 1988, the Lubbock Independent School District ("LISD") on February 1, 1991, filed, pursuant to that decree, a notice of site selection for a new junior high school and a

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

proposed reorganization plan for the school district. The appellants filed their motion to intervene on March 13, 1991. The magistrate judge conducted an extensive hearing, the transcript of which spans three volumes and 449 pages. In a comprehensive twenty-six-page order, the magistrate judge determined that intervention should be denied. Following the filing of objections to the recommendation,the district court, in a twelve-page opinion,adopted the magistrate judge's findings and conclusions as its own and denied the motion to intervene. The Court also granted the unsuccessful intervenors the status of amici curiae in order that they might express their views to the plaintiff, i.e., the United States, and to the court.

In Bush v. Viterna, 740 F.2d 350, 354 (5th Cir. 1984), we held that to intervene as

a matter of right, a would-be intervenor must satisfy four requirements. We agree with the district court's conclusion that in this case, we need not consider the first three, as we, like the district court, observe that the fourth requirement has not been met, i.e., that "the applicant's interest must be inadequately represented by the existing parties to the suit." Id.

Specifically, as the magistrate judge and district court found, the interests of the appellants are adequately represented by the government in this case. "[W]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petition must demonstrate adversity of interest, collusion,or nonfeasance." Bush, id. at 355.

Here, as the magistrate judge and district court noted, the primary interest of the appellants and the government is the same: to achieve a unitary school district. In school desegregation cases, intervention is denied when the interests alleged "are unrelated to desegregation and the establishment of a unitary school system." United States v. Perry County Bd. of Educ., 567 F.2d 277, 280 (5th Cir. 1978). Here, the would-be intervenors complain of such things as the location of a junior high school and the decision not to use one facility as a full junior high school, but these matters are not "within the purview of the federal courts" unless they have "an impact on segregation." Id. Accord Monteilh v. St. Landry Parish Schl. Bd., 848 F.2d 625,632 (5th Cir. 1988). Moreover, "a cognizable interest in litigation does not inevitably result in a

right to intervention." Cajun Elec. Power Coop. v. Gulf States Utils., 940 F.2d 117, 120 (5th Cir. 1991).

Importantly, "where . . . the existing representative in the suit is the government, there is a presumption of adequate representation which may be overcome ... only upon a showing of adversity of interest, the representative's collusion with the opposing party, or nonfeasance by the representative." Texas v. United States Dep't of Energy, 754 F.2d 550, 553 (5th Cir. 1985). There is no adversity of interest here. As the district court noted, the government, like the appellants, has objected to certain aspects of the proposed reorganization plan, and the ultimate goal of the government is the same as appellants'. The appellants assert that collusion is shown by the fact of visits by LISD personnel to government officials

in Washington, D.C. The district court properly noted, thought, that such meetings were only a part of the process of negotiation, not collusion.

Finally, the district court discounted the appellants' assertion that the government is guilty of nonfeasance. The same district judge has presided over these proceedings since their inception in 1970. His opinion catalogues the diligent efforts of the government to achieve desegregation in LISD, and we give great weight to his conclusion that "[t]he Proposed Intervenors have wholly failed in showing inadequate representation on the part of the Government."

In summary, the appellants have not made a sufficient showing of inadequate representation by the government. The order denying intervention is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

THE UNITED STATES OF AMERICA	§	
V.	§	CIVIL ACTION NO. CA5-806
LUBBOCK INDEPENDENT SCHOOL DISTRICT; MIKE MOSES, Superintendent (successor to Edwin H. Irons, Superintendent); THE TEXAS EDUCATION AGENCY; and DR. J. W. EDGAR, Commissioner of Education	§	

MEMORANDUM OPINION AND ORDER

The United States of America, through the Department of Justice, originally filed a complaint in the Dallas Division of the Northern District of Texas,

on August 7, 1970, against the Texas Education Agency and six Independent School Districts and their superintendents. The Lubbock Independent School District (LISD) was one of the named school districts. Upon Mandate issued by the Fifth Circuit Court of Appeals, 431 F.2d 1313 (1970), the action was severed as to the LISD and this action against the LISD was transferred to the Lubbock Division on August 19, 1970, for an immediate hearing.

After a two day hearing,this Court entered its Memorandum Opinion on August 25, 1970, in which the LISD was ordered to implement a limited desegregation plan. United States v. Lubbock Independent School District, 316 F.Supp. 1310 (N.D. Tex. 1970). This Court ordered the LISD to integrate Dunbar High School and Struggs Junior High School

(both all black schools) by the adjustment of attendance zones. It was also found that out of the 38 elementary schools being operated by the LISD, there was evidence that there remained vestiges of a dual system with regard to six elementary schools. However, the Court refused to grant the proposed remedies sought by the United States, finding that each elementary child should attend his neighborhood school. Other relief sought by the United States was denied, but no appeal was taken.

During the period from 1970 until the Spring of 1977, no significant action was taken. In the Spring of 1977, however, the LISD sought permission to implement certain proposed construction projects. The United Sates opposed this motion and filed its own motion, alleging that the 1970 Order had failed to desegregate the LISD

schools. After an evidentiary hearing, the Court entered its Memorandum Opinion and Order on January 17, 1978, finding that 22 schools were racially identifiable minority schools, but that only nine were racially identifiable because of discriminator acts or segregative intent on the part of the LISD. United States v. Lubbock Independent Sch., 455 F.Supp. 1223 (N.D. Tex. 1978). Schools having a combines Hispanic and Black student population in excess of 70% were considered to be racially identifiable minority schools.[1] It was also found that, even thought the LISD had complied with the August, 1970, Order regarding Dunbar High School and Struggs Junior High School, the constitutional violations then in existence were not remedied. The Court

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[1] See Appendix A

ordered the LISD to propose a plan for student attendance which would eradicate all vestiges of segregation at Dunbar High School, Struggs Junior High School, and the following elementary schools, i.e. Wheatley, Iles, martin, Posey, Sanders, Guadalupe and Mahon, and suggested certain guidelines.

LISD filed its proposed plan on March 10, 1978, and after holding a hearing, the Court entered it Order on April 3, 1978, ordering the LISD to submit either a new plan or a modification which would accomplish full integration in Grades 1 through 6 in five elementary schools, i.e. Wheatley, martin, Posey, Guadalupe, and Mahon. The Court approved the plan to make Iles Elementary and the Dunbar-Struggs complex magnet schools; to close Struggs as a junior high school and to incorporate it into the Dunbar High School

campus; approved the construction of a new junior high school and two elementary schools south of Loop 289; and ordered the majority-to-minority transfer policy to be widely publicized. A Supplemental Order was entered on April 4, 1978, correcting the number of new elementary schools to be constructed to be "three" instead of "two".

After the LISD filed its new plan of desegregation, the new plan was approved by Memorandum and Order dated May 8, 1978. By this Order, the Court approved the mandatory transportation plan for Grades 1 through 6 in the five court-ordered minority schools; approved the magnet programs for Iles Elementary School and the Dunbar-Struggs campus; approved the majority-to-minority transfer plan; and ordered certain

reporting procedures to be followed by the LISD.

The United States filed its appeal to the Fifth Circuit Court of Appeals, and by opinion dated August 9, 1979, the case was remanded to this Court for additional findings of fact. United States v. Texas Ed. Agency, 600 F.2d 518 (5th Cir. 1979).

Thereafter, an evidentiary hearing was held in January and February, 1980, with the Court entering its Memorandum opinion and Order on April 15, 1981, ordering the LISD to submit a proposed plan to desegregate Matthews Junior High School and Bozeman Elementary School.

The Amended Plan of Desegregation of July 8, 1981, was agreed to by the United States and approved by the Court by Order dated July 20, 1981. This plan provided for desegregation of Matthews Junior High School and Bozeman

Elementary School; for construction and operation of three elementary schools south of Loop 289; implemented the junior high plan for the 1982-83 school year; and approved the proposed reporting of racial status of each of the LISD schools.

The United States filed its appeal from the April 15, 1981, Order and a portion of the July 20 Order and the LISD filed a corss-appeal.

The case was remanded to this Court by the Fifth Circuit on November 14, 1983,upon joint motion, because the parties had entered into an agreed settlement.

The United States and the LISD submitted a proposed Consent Decree which was entered by the Court on November 29, 1983, which provided, in part, for:

(1) A magnet program at Estacado High School;

(2) Established a magnet program at Alderson Junior High School;

(3) The parties agreed that Thompson Junior High School could be closed;

(4) Magnet programs were to be established at Tubbs and Wilson Elementary Schools;

(5) Steps were to be taken to assure equal educational opportunities and to improve instructional programs at Jackson, McWhorter, Parkway, Wolfforth, Harwell and Hunt Elementary Schools;

(6) Plans to make additions to various schools were approved;

(7) The majority to minority transfer policy was to remain in full force and effect;

(8) Procedures were provided to evaluate the magnet schools;

(9) Additional reports were to be made to the Court; and

(10) Provision was made to enable to the LISD to seek unitary status three years after the implementation of the magnet school programs, or at the conclusion of the 1986-87 school year.

The Court;s prior Orders of August 22, 1970, April 3, 1978, May 8, 1978, and July 20, 1981, were to remain in effect insofar as they were not inconsistent with the provisions of the November 29, 1983, Consent Decree.

A new elementary school in the central part of Lubbock was approved by Consent Decree dated April 25, 1985, such school to be operated as a magnet school.

During the period from 1985 until July, 1986, several Consent Decrees were

entered approving construction of additions to various schools in the district and for the elimination of mandatory transportation of third and fourth grade students from Roscoe Wilson Elementary School to Martin Elementary School.

Then on July 7, 1986, three individuals, i.e. Olga Riojas, Felipa Nettie Gloria, and Maria Chavez, sought to intervene in the case. The Court denied intervention on the issue of the use, operation,and sale of Thompson Junior High School on July 28, 1986, and found that an evidentiary hearing would be required to determine whether or not intervention would be permitted on the remaining issues raised by the proposed intervenors. A deadline was established for the proposed intervenors to notify the Court if they desired an evidentiary hearing would be required to determine

whether or not intervention would be permitted on the remaining issues raised by the proposed intervenor. A deadline was established for the proposed intervenors to notify the Court if they desired an evidentiary hearing on their remaining claims. Thereafter, on June 4, 1987, the Court entered an Order preserving the proposed intervenors' right to be heard and to renew their motion to intervene upon the LISD filing its application for declaration of unitary status.

On July 15, 1987, Linda DeLeon, in her individual capacity and as a member of the LISD Board of Trustees, filed a Cross Complaint for Declaratory Judgment and for Alternative Relief against LISD and Board of Trustee Members, Gary Boren, Nancy Neal, Monte Hasie, Martha Farmer, and Billie Caviel, in both their individual and Trustee capacities.

Permission was granted for intervention on August 12, 1987, and on September 7, 1987, after application by Linda DeLeon, she too was granted intervenor status.

On September 21, 1987, a Judgment on DeLeon's Cross-Action was entered denying and dismissing with prejudice all relief sought against the Cross-Defendants.

A proposed Consent Decree had been submitted to the Court, which was opposed by the intervenors, and a hearing held on September 4 and 7, 1987. Thereafter, the Court entered an Order dated November 2, 1987, which provided, in part, for entry of the proposed Consent Decree; dismissed DeLeon's Cross-Complaint; authorized attendance boundary line changes; and authorized construction of a new junior high school.

The Consent Decree was filed on November 2, 1987, in which in was found that no "instances of noncompliance, unlawful segregative effect, or segregative intent" had been found in the LISD's implementation of the November 29, 1983, Consent Decree and other prior Orders with respect to elementary schools. This Consent Decree authorized changes of boundary lines for the junior high schools; additional features and adjustment to be added to the Estacado magnet; established a gifted and talented magnet program at O.L. Slaton and J.T. Hutchinson Junior High Schools; a new junior high school would be built in southwest Lubbock; required the continuation of reporting by the LISD; and provided that the LISD could move for a declaration of unitary status on February 28, 1988, or six months of the

entry of the November 2, 1987, Consent Decree.

The intervenors filed a notice of appeal to the Fifth Circuit Court of Appeals; thereafter, a proposed Consent Decree was submitted to the Court, agreed to by all parties, including the intervenors. This Consent Decree was filed on March 2, 1988, and provided, in part, that:

(1) The appeal would be withdrawn;

(2) The LISD would construct a new junior high school within a specified ten square mile area, at such time as it was determined that 500 junior high students resided in that area for school attendance purposes.

The intervenors agreed to withdraw all objections to prior Consent Decrees; to refrain from attempting, encouraging, or supporting further intervention in this

case; and to not contest LISD's motion for unitary status.

The March 2, 1988, Consent Decree was signed by attorneys for all parties, by each individual intervenor, LISD Board Trustees, and the LISD superintendent.

The LISD filed its Motion for Declaration of Unitary Status on March 24, 1988, and a hearing was held on April 14, 1988, with an agreed record and Consent Decree being filed. The Agreed Record and Consent Decree was approved and signed by attorneys for the United States and the LISD. A supplemental Agreed Record was filed on May 2, 1988.

The Court entered its Order declaring the LISD to be unitary on May 3, 1988, and provided that the case be placed on the inactive docket for a period of not less than three years. The desegregation plan embodied by existing Orders and Consent

Decrees was ordered to remain in full force and effect. After the three year period had expired, the Court would provide ;the United States an opportunity to show cause why the case should not be dismissed, the injunctions dissolved judgment discharged, and jurisdiction terminated.

Beginning in early 1989, the intervenors/parties to the March 2, 1988, Consent Decree, claimed that there were 500 students within the designated area for the building of a new junior high school as provided by the March 2, 1988, Consent Decree. An evidentiary hearing was held on May 9, 1990, after which the Court entered an Order finding that the required count of 500 students had been attained and the LISD was ordered to construct its new junior high school, with the exact location to be determined by the LISD.

The LISD was ordered on September 26, 1990, to submit its proposed plan of student assignment as affected by the construction of the new junior high school and to designate the site for such school. By this same Order, the intervenors were dismissed from this litigation.

There is now pending before the Court the Motion of the LISD to Modify the Existing Desegregation Plan for the District, in which the LISD has also designated its site for the location for the new junior high school designated as Cavazos Junior High School.

After the Motion to Modify was filed, five individuals sought to intervene to oppose the proposed modification of the desegregation plan. After an evidentiary hearing on April 29-30 and May 2, 1991, before the Magistrate Judge, intervenor status was denied.

A four-day evidentiary hearing, on the issued of dismissal of the case and the proposed modification of the desegregation plan, was held before the Court, in Lubbock, Texas, on August 13-16, 1991, with counsel and parties in attendance. Oral arguments were heard on September 11, 1991. Certain parties have been granted amicus curiae standing and the Court has considered the briefs filed by those parties, which includes the proposed intervenors.

PREVIOUS FINDING OF UNITARY STATUS

By Consent Decree dated November 2, 1987, the United States and the LISD agreed that:

Lubbock Independent School District will be entitled to move the Court for a declaration of unitary status on February 28, 1988, or six months from the date

upon which this Consent Decree is entered by the Court, which every date is earlier. The United States will join Lubbock Independent School District in its motion for unitary status, whereby the injunctions in this case will be dissolved, the judgment discharged, jurisdiction terminated, and the case closed and dismissed with prejudice, unless the United States determines that Lubbock Independent School District has not substantially complied with the requirements place upon it by this Consent Decree.[2]

The Court also found that the United States and LISD had entered into settlement negotiations regarding other predominantly minority schools, which

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[2] See Consent dated November 2, 1987, at page 12

settlement had culminated into the November 29, 1983, Consent Decree, with subsequent modifications.

The Court then found, in relevant part, that:

> 1. The Lubbock Independent School District has eliminated all vestiges of a de jure segregated school system found by this Court to have existed in the operation of its schools.
>
> 2. The Court concludes that the Lubbock Independent School District has satisfactorily complied in all material respects with the consent decrees and other orders entered in this case.
>
> 3. Thus, in all respects at issue, the dual school system which Lubbock once had has been dismantled and its vestiges eliminated.

The case was placed on the inactive docket for not less than three years.

Thereafter, on May 3, 1988, the Court declared the LISD to be unitary and

required the LISD to continue its reporting, as required by prior Orders and Consent Decrees, during the three year period.

No appeal was taken from the May 3, 1988, Order granting unitary status.

ISSUES BEFORE THE COURT

Two main issues are before the Court -- (1) whether or not the LISD is entitled to have prior Decrees, Orders, and Injunctions dissolved, to be released from Court supervision and to have the case dismissed; and (2) whether or not the proposed modification of the desegregation plan creates new constitutional violations or is a product of segregative intent on the part of the LISD, and if no violations are shown, should the proposed modification be approved.

FINDINGS AND CONCLUSIONS

This Memorandum Opinion will constitute the Court's findings of fact and conclusions of law to support the Judgment hereinafter ordered.

The above procedures show that there was a spirit of cooperation on the part of the LISD and its administrators and Board of Trustees. LISD cooperated at all times and promptly followed the Orders of the Court, whether required by Consent Decrees or after hearing. Consent Decrees were entered into after conferences between the parties.s The evidence before the Court has established that there has been no continued discriminatory acts, and the Court has so found. Further, there is no evidence of motive or intent to support findings of discrimination, but rather the opposite is found.

ISSUE OF DISMISSAL

In the Fifth Circuit, a school desegregation case is not to be dismissed until at least three years have passed since the school system is declared to be unitary. Flax v. Potts, 915 F.2d 155, 158 (5th Cir. 1990); Youngblood v. Board of Pub. Instruction, 448 F.2d 770, 771 (5th Cir. 1971). During this three year period, the school district is to report to the Court. Monteilh v. St. Landry Parish School Bd., 848 F.2d 625 (5th Cir. 1988).

By the Order declaring LISD to have achieved unitary status, the Court provided that the United States would be given an opportunity to show cause why the case should not be dismissed after the three year period. This opportunity was given at the four day hearing on August 13-16, 1991.

In deciding whether to terminate desegregation decrees, the Supreme Court has instructed District Courts to:

> address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.

Board of Educ. of Oklahoma City P. Sch. v. Dowell, _____ U.S. _____, 111 S. Ct. 630, 638 (1991).

The District Court is to look "not only at student assignment, but 'to every facet of school operations -- faculty, staff, transportation, extra--curricular activities and facilities'" in determining whether vestiges of de jure segregation have been eliminated. Id. quoting Green v. New Kent County School Board, 391 U.S. 430 at 435 (1968).

All parties have agreed with the principle that the United States Supreme Court in Brown v. Board of Education, 347 U.S. 483 (1954) (Brown I) prohibits the operation of a school district where racial discrimination exists and that such discrimination is a violation of the Fourteenth Amendment to the United States Constitution.

In applying the review standard set forth by the Supreme Court above, there has been no opposition by the United States to the assertion that the LISD's faculty and staff have been fully desegregated. Further, this Court has previously found that unlawful segregation has not existed with respect to extra-curricular activities, transportation and facilities.

The appellate Courts have recognized that "necessary concerns for the

important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination." Spangler V. Pasadena City Bd. of Education, 611 F.2d 1239, 1245 n.5 (Kennedy, J., concurring) (9th Cir. 1979), citing Milliken v. Bradley {Milliken II}, 433 U.S. 267, at 280-82 (1977): Board of Educ. of Oklahoma City P. Sch. V. Dowell, 111 S.Ct. at 637.

It is with these guidelines in mind, that this Court reviews the granting of unitary status and the LISD's attempts to comply with the various Consent Decrees and Orders issued by this Court and the desegregation plan imposed thereby.

Attached hereto as Appendix A are charts reflecting the minority enrollments for the schools previously found to have

been vestiges of an unconstitutional de jure segregated school system. The minority enrollments for each of these schools are clear indication that the LISD has complied with the desegregation plans and Orders of this Court, and that desegregation of the student bodies of these schools had been reached at the time of the declaration of unitary status in May, 1988, and that desegregation has been maintained in each of the schools as of this date.

The Court find that the history of this case over the past 22 years indicates that the Lubbock Independent School District, through its Board of Trustees, administrators, principals, and teachers, has diligently worked to establish a unitary system that will be of educational benefit to the students. Efforts have been made to comply with the mandate of the United States Constitution.

Since 1978, no discriminatory acts or intent have been shown by the records in this case, although the parties and witnesses disagree on the methods used to obtain such a desegregated system.

The principal criteria required in achieving a unitary system has been through the adjustment of attendance procedures. When the Complaint in this suit was filed in August, 1970, there had been a student population for the school year 1969-70 of 33,213 students residing in the school district, with a racial makeup of 11.5% Black, 20.84% Hispanic, and 67.15% Anglo. The student population for the 1990-91 school year (as of October 5, 1990) was 30,943, with a racial mix of 13.84% Black, 36.72% Hispanic, and 49.44% Anglo. Through the use of adjustment of attendance boundaries, establishment of magnet programs,

majority-to-minority transfers, and mandatory transportation using paired schools in the district has been accomplished. See Appendix C.

The LISD has taken other steps to show its good faith in complying with the desegregation plan and the Court's Orders. In 1989 LISD obtained passage of a 58.5% million dollar bond issue for facility improvements, additions to existing facilities, construction of the proposed Cavazos Junior High School, removal of asbestos, and other things. Maintenance and construction were prioritized with the minority schools having first priority. Air conditioning has been added to al facilities no previously air conditioned. Several schools have had additions built to house the student populations, others are proposed. Over one-half of the bond issue was earmarked for minority schools.

In 1989 the Trustees approved a 34 percent tax increase, which placed approximately 12 million new dollars into the educational system.

A citizens Advisory Committee was appointed in 1990 to study and make recommendations regarding school programs, facilities, and administration. This Committee was made up of both minority and non-minority members. Public hearings were held, both by the Advisory Committee and the Board of Trustees, for public input and participation the decision-making process.

The LISD has continued to comply with all Consent Decrees and with reporting requirements ordered by the Court in prior Orders and has communicated with the Department of Justice regarding proposals.

Although there has been a decrease in non-minority student enrollment at some of the racially identifiable schools, the evidence indicates that there has been a shift in population and changes in racial housing patterns i areas where recognized minority schools are located. As found in Flax v. Potts, 915 F.2d 155, 161 (5th Cir. 1990) these "changes in housing patterns are not the result of the District's efforts to foster segregation." The Fifth Circuit has found that "school officials who have taken effective action have no affirmative fourteenth-amendment duty to respond to the private action of those who vote with their feet." Id. at 162 [quoting Ross v. Houston Indep. School Dist., 699 F.2d 218 at 255 (5th Cir. 1983) citing Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976(].

Although it is recognized that the magnet programs at Dunbar-Struggs High School and Estacado High School have not drawn non-minority students as anticipated, that in and of itself is not suficient to find non-compliance on the part of the LISD. The vocational magnet which had been established at Dunbar-Struggs High School was successful in the early years, but there has been a decline in demand for the programs offered. In fact, one of the teachers for the magnet courses was surplused by the Dunbar-Struggs principal becasue there were not enough students enrolling for the courses for the courses to make. Two other teachers were surplused at Dunbar-Struggs because there was a lack of student enrollment and demand for some course. The courses have been offered, but classes have not made because of a lack of enrollment. There have

been some courses taught at Dunbar-Struggs where the pupil/teacher ration was 6:1. LISD had advertised the magnet programs and there was a teacher/counselor in charge of recruiting; however, the magnet was unsuccessful.

The computer magnet program at Estacado High School was established by the LISD at the request of the Untied States, and was based upon any finding by this Court that Estacado High School was a de jure segregated school. This magnet, also, has not been as successful as anticipated, but has been more successful than the magnet at Dunbar-Struggs.

Prior Orders of this Court have obligated the LISD to establish magnet programs in ten schools. Of these ten magnet programs, eight have been successful.

The remaining eight magnet programs in the district have been very successful drawing non-minority students to minority schools. The Lubbock Exemplary Academic Program (LEAP) at Lubbock High School (a magnet program voluntarily established by LISD) has had over 700 students enroled in that magnet, while the magnets at Hutchinson Junior High School and O.L. Slaton Junior High School have had waiting lists - sometimes more than twice the number of applicants as spaces available.

Based on a totality of circumstances, the Court finds that the LISD has acted in good faith and has operated in compliance with the desegregation plan, Consent Decrees and Orders of this Court, and that the vestiges of past discrimination previously found by this Court have been eliminated to the extent practicable.

Therefore, the Court finds that the LISD should be discharged from Court supervision, that all Consent Decrees, Orders, and injunctions should be terminated and this case dismissed.

It is to be noted, that the LISD will still have a contractual obligation, as set forth in the Consent Decree dated March 3, 1988, to comply with the construction of Cavazos Junior High Schools and a constitutional duty, as well as contractual, to take all steps necessary to meet a desegregative enrollment at Cavazos Junior High School within the time provided by the Consent Decree.

PROPOSED MODIFICATION OF THE DESEGREGATION PLAN

The current desegregation plan is set forth, in outline form, and made a part of the record, in Defendants' Trial Exhibits

Nos. 23, 25 and 27, with the proposed modified plan being shown in Defendants' Trial Exhibits No. 24, 26 and 28.

As to the essential elements of the proposed plan, the United States has no opposition to the following:

(1) The transfer of students in the Ninth Grade form Estacado High School (which now houses grades 9-12) to Alderson Junior High Schools;

(2) Maintaining and leaving the transitional academic achievement program (TAAP) at Irons Junior High School;

(3) Adjusting the boundary lines between Irons Junior High School and Smylie/Wilson Junior High School;

(4) The proposed location of Cavazos Junior High School, such site being designated by the LISD pursuant to its duty and obligation, as recognized by

Swann v. Charlotte-Mecklenburg Board of Educatin, 402 U.S. 1, 20 (1971) and this Court, within the sub-area described in this Court's Order of July 10, 1990, such school location being described as a 20.9 acre tract bounded by North University Avenue on the west, Auburn Street to the south, Baylor Street on the north, and Vernon Avenue on the east.

(5) That the following elementary schools be designated as stand-alone schools, i.e. no longer requiring mandatory transportation to achieve a desegregative racial mix because the resident population at such schools is sufficient to meet the standard heretofore applied by this Court and the parties hereto: Bayless, Overton, Stubbs, Wester, Wheelock, and Williams.

(6) That Iles Elementary School and Mahon Elementary Schools will be removed as sending schools from the

mandatory transportation plan, but that such schools will continue to receive magnet and assigned students.

The United States opposes the following proposals:

(1) The closing of Matthews Junior High School as a Seventh Grade Learning Center and its re-utilization as an educational facility for programs other than regular classroom activities - possibly an adult learning center.

(2) The closing of Dunbar-Struggs High School and the re-utilization of its campus as a junior high school.

(3) The proposal to eliminate mandatory transportation for First, Second, and Sixth grade students, leaving mandatory transportation as a part of the plan for Third, fourth, and Fifth grade students.

The Supreme Court has instructed that when a school district seeks termination of a desegregation case and also files a proposed modification of the current plan, that the district Court should "evaluate the Board's decision" to modify the plan "under appropriate equal protection principles." Board of Educ. of Oklahoma City P. Sch. v. Dowell, at 638.

As set out hereinabove, the United States has no opposition to certain provisions of the proposed modification, and the Court finds that those areas of agreement should be in all things approved. By Agreed Order entered august 22,1991, this Court has already approved the implementation of the following modifications:

(1) The recognition of the following elementary schools as stand-alone

schools; Bayless, Overton, Stubbs, Wester, Wheelock, and Williams;

(2) The removal of Iles Elementary School and Mahon Elementary School as sending schools from the mandatory transportation plan;

(3) The change of the attendance boundary lines between Irons Junior High School and Smylie Wilson Junior High School; and

(4) The offering of algebra and geometry in all junior high schools within the LISD district.

Each of the proposals to which the United States objects will be discussed individually.

I Re-utilization of Matthews Junior High School

Matthews Junior High School is currently a Seventh Grade Learning Center with seventh grade students from

Evans Junior High School and Mackenzie Junior High School being mandatorily transported to Matthews. Also, the resident seventh grade students in the Matthews area attend Matthews.

The site selected by the LISD for the new junior high school to be known as Cavazos Junior High School is within a few blocks of the existing Matthews Junior High School campus. Those seventh grade students now attending Matthews Junior High Schools would, under the proposed plan, attend Evans, Mackenzie, and Cavazos Junior High Schools.

Matthews would re re-utilized as some type of district-wide educational facility for programs other than regular classrom activities.

The Court finds that once the Cavazos Junior High School has been constructed and it put into operation,the

LISD's proposal to close Matthews as a Seventh Grade Learning Center and re-utilize the campus for other types of educational activities should be approved. It is noted that although, the United States has voiced some opposition to this proposal, no evidence has been presented to support a finding that there would be any unconstitutional violation or segregative intent on the part of the LISD regarding Matthews.

II. Closing of Dunbar-Struggs High School and Re-Utilization of the Dunbar-Struggs Campus as a Junior High School

(a) Closing of Dunbar-Struggs High School

LISD proposes to close Dunbar-Struggs High School, and to redraw the attendance boundary lines so that approximately 36% of the present Dunbar-Struggs High Schools resident students

would attend Monterey High School and approximately 64% would attend Estacado High School. There are currently five high schools the district -- Dunbar-Struggs, Estacado, Coronado, Monterey, ad Lubbock.

Reasons cited by the LISD for closing Dunbar-Struggs as a high school include (1) deficit in academic program for all students because of the inability to offer certain courses because of insufficient student enrollment, (2) the cost per student is higher at Dunbar -Struggs than at other high schools campuses, (3) recommendations from the Citizens Advisory Board[3] , Deloitte and Touche[4] , and the Board of Trustees, (4) extra-curricular and co-curricular activities

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3 See Defendants' Trial Exhibit 64
4 See Defendants' Trial Exhibit 50

difficult to retain, and many were cancelled during the 1990-91 school year because of lack of participation, (5) student morale lessened by inability to maintain competitive level of performance, and (6) personnel utilization is not as efficient.[5]

In 1970 when this suit was first filed, the LISD high school total enrollment was 6416 students, with building capacities for 8175 students, for a facility utilization of 78.5%. The 1990 high school total student enrollment was 5612, with a building capacity of 7958 for a 70.5% facility utilization.[6] At the end of the 1990-91 school year the total facility utilization had dropped to 67.5%.[7]

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5 See Defendants' Trial Exhibit 36
6 See Defendants' Trial Exhibit 63
7 See Defendants' Trial Exhibit 57

Five-year enrollment comparison for the five high schools has shown a significant drop in enrollment both at Dunbar-Struggs (-17.5% first six weeks of school and -15.7% sixth six weeks) and Estacado (-14.1% first six weeks and -17.4% sixth six weeks).[8] The same comparison for the other three high schools show -- Coronado (-9.3%/-12.4%); Lubbock (+4.4%/+2.2%), and Monterey (-3.2%/-2.8%). [9] A Three-year comparison indicates that Dunbar-Struggs and Estacado continue to have a negative enrollment. The total student enrollment at Dunbar-Struggs for the 1990-91 school year was 514 during the first six weeks, dropping to 462 the sixth six weeks. The building capacity at Dunbar-Struggs High

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8 See Defendants' Trial Exhibit 13
9 See Defendants' Trial Exhibit 56

School for the 1990-91 school year was 690 students. The facility utilization was 76.4% the first six weeks, dropping to 67.5% the end of school.[10]

The Citizens Advisory Committee, after input from the public, recommended to the LISD the adoption of either a two-high schools plan or a four-high school plan. This Advisory Committee was established to look at not only building utilization,but boundaries, magnet programs, and configurations. The one chosen by the Board of Trustees, for proposal to the Court was the four-high school plan. Defendants' Trial Exhibit 16 makes a comparison of capacity of five different four-high school combinations, based upon an enrollment figure of 5612 students. From those comparisons, the

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10 See Defendants' Trial Exhibit 57

most feasible is a combination of Coronado, Estacado, Lubbock, and Monterey with a building capacity of 82.7% and program capacity of 85.4%. This is significantly less than combinations with Dunbar-Struggs as one of the four high schools.

The cost per student a Dunbar-Struggs is $5,452.00 as opposed to $4,987.00 at Estacado, $2,845.00 at Monterey, $2,715.00 at Coronado, and $2,796.00 at Lubbock. The district-wide average for all students, including elementary, junior high, and high school, is $3,814.00 per student.[11]

The Court acknowledges that there is strong public opposition within the Black community to the closing of Dunbar-Struggs as a high school. This opposition is

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11 See Defendants' Trial Exhibit 7

based more upon emotions, sentimentality, and a strong sense of heritage rather than educational opportunity for the students. There was evidence that the minority community wants to ensure that at least one neighborhood high school remains -- this would be either Dunbar-Struggs or Estacado.

There is evidence of a decrease in the general population in both the Dunbar-Struggs and the Estacado areas, with population surrounding Estacado dropping the 17% and Dunbar-Struggs by 13%. This drop in population is based upon the 1990 census levels of the voting precincts.

Although there has been a significant drop in student enrollment at Estacado, the facilities at Estacado are newer, much larger, and more accessible to

transportation. The Estacado campus is located on a 40-50 acre tract with excellent parking, practice fields, and facilities.

In 1970, the resident student enrollment at Dunbar-Struggs was 99.15% minority, with 97.24% Black and 1.91% Hispanic. For the 1990-91 school year, Dunbar-Struggs' student enrollment was 45.91% Hispanic and 35.99% Black.

In proposing the four-high school configuration, the LISD proposes to offer magnet programs at both Estacado and Lubbock High Schools to draw non-minority students from Coronado and Monterey High Schools. The LEAP program would remain at Lubbock, and the Estacado magnet would be changed from a computer magnet to a program offering professional career opportunities. In investigating a proposed magnet at Estacado, the LISD conducted student

surveys to determine the interest of students who would be drawn to the magnet, contacted other schools who have successful high school magnets, and consulted with experts outside the district.

The LEAP magnet at Lubbock High School has proven to be very successful in drawing non-minority students to that school. The expert witnesses for the LISD, and other evidence, indicate that a strong magnet program placed at Estacado would also be a successful tool in achieving desegregation for the Estacado campus. The Estacado magnet would need to be a strong program, comparable in quality to the LEAP program at Lubbock High School.

The projected ethnic percentages for Estacado High School, if the proposed modification is approved, would be a campus composed of 83% minority and 17% non-minority. In comparing these

percentages to those for the 1987-88 school years (when LISD was declared unitary), they are much lower, as the minority enrollment of Estacado for the 1987-88 school years was 95.29%. The Dunbar-Struggs campus was 73.60% minority at the time when unitary status was recognized. Although Estacado High School has always been a racially identifiable school, it has never been found, and the Court does not now find, Estacado to be racially identifiable because of discriminatory acts or segregative intent on the part of the LISD.

Although the Untied States opposes the closing of Dunbar-Struggs High School and the four-high school concept proposed by the LISD, no evidence has been presented that the proposal would result in establishing a segregated campus. The evidence supports just the opposite and

overwhelmingly established a good faith desire on the part of the LISD to establish a program that would better utilize high school facilities and provide a more enriched and comprehensive education for the high school students.

(b) Re-Utilization of Dunbar-Struggs Campus as Junior High School

The modified plan proposes, in part, to close the Dunbar-Struggs campus as a High School and to re-utilize the campus as a Junior High School. As an alternative to the Junior High School magnet proposal (as shown on Defendants' Trial Exhibit 26), the LISD has offered three alternative proposals to achieve desegregation at Dunbar Junior High School, if re-utilization is approved, i.e. (1) an academically enriched program, (2) paired busing,

and/or (3) establishment of a magnet program.

The LISD cites as some of the advantages of re-utilization of the Dunbar-Struggs campus as a junior high school: (1) a neighborhood junior high school for resident students who now attend O.L. Slaton and Atkins Junior High Schools; (2) a reduction of mandatory transportation for the resident students; (3) creation of a feeder system for Estacado High School; (4) better utilization of the facility.[12]

Under the proposed modification at the junior high school level, there would be ten junior high schools with the addition of Dunbar and Cavazos. It is recognized, of course, that both Cavazos and Dunbar would be racially identifiable junior high schools, but under the Consent Decree of

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12 See Defendants' Trial Exhibit 33

March 2, 1988, the LISD has two years from the date Cavazos is opened to "achieve a majority student enrollment that is within plus or minus 20 percent points of the average majority enrollment at the junior high schools level." A magnet program similar to that in place at Hutchinson and O.L. Slaton is proposed for Cavazos. The evidence before the Court indicates that over the past several years 500-600 students have applied for the magnet programs at Hutchinson and O.L. Slaton, but only 125 students for each campus have been accepted because of building and program capacity limitations. If the number of applications continues, as in the past, there would be sufficient magnet students available to desegregate both Cavazos and Dunbar. Another alternative for Dunbar-Struggs would be the use of mandatory transportation the

event a magnet program should prove to be unsuccessful.[13]

III. Elimination of Mandatory Transportation for Grades One, Two and Six

LISD proposes to eliminate mandatory transportation for First, Second, and Sixth grade students, leaving mandatory transportation as a part of the plan for Third, Fourth, and Fifth grade students. There would be twelve non-minority schools and five minority schools affected by the mandatory transportation. As a part of this proposal, students, both minority and non-minority, would only be bused one year. See Appendix B for the LISD Proposed Elementary Desegregation Plan.

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13 See Defendants' Trial Exhibit 35

At the 17 elementary schools involved under the proposed plan, mandatory transportation for the 1990-91 school year, and prior years, affected students in the First, Second, Third, Fourth, Fifth, and Sixth Grades. Students were mandatorily transported based upon a formula of using the alphabet to determine which students would be bused in a particular year. Minorities were bused two years and non-minorities were bused one year.

Under the propose plan, mandatory transportation would only be required for students attending the Third, Fourth, and Fifth Grades, again using a formula based upon the alphabet. However, both minorities and non-minorities would only be bused one year.

It is recognized by the LISD that elimination of busing for the First, Second, and Sixth Grades would create racially

identifiable grades in the five minority schools in the First, Second, and Sixth grades. However, the campuses at each of the five minority elementary schools would remain segregated campuses based upon the mandatory transportation of the Third, Fourth, and Fifth Grades, at which campuses there would be interaction between all students, outside the regular classroom. The five minority schools are Bozeman, Guadalupe, Martin, Posey, and Wheatley.[14]

The evidence before the Court is to the effect that there has been no opposition from the community to the elimination of mandatory transportation for First, Second, and Sixth grade students. In fact, the amicus briefs support this portion of

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14 See Defendants' Trial Exhibit 47, Charts attached to Letter dated June 26, 1991

the plan, as did the Citizens Advisory Committee. The United States, however, opposes the elimination of mandatory transportation of these three grades.

Supporting reasons for the elimination of mandatory transportation came from testimony of school officials and the expert witnesses called by the LISD. Those reasons include:

(1) desires of the community;

(2) need for ongoing parental involvement, particularly at the First and Second Grade levels, which is made easier with neighborhood schools;

(3) strong parental contact with teachers;

(4) removal of anxiety from both the parents' and students' standpoints in the early years of school;

(5) some federally funded programs designed from minority students may not

be available to minority students who are transported to a non-minority schools;

(6) at the Sixth Grade level, it is important, again, for parental involvement prior to the student entering junior high school, which fosters continued parental involvement during secondary school;

(7) the importance of Sixth Graders establishing a relationship with their peers with which they will be entering secondary schools;

(8) voluntary programs, i.e. magnets and majority-to-minority transfers, are more conducive to learning than are mandatory programs such as busing.

Both experts for the LISD supported the elimination of mandatory transportation for the First, Second, and Sixth Grades. The expert for the United States, admitted that if the proposal was

approved, the campuses would remain desegregated, but argued for desegregation of each individual grade, admitting, however, that there would be interaction between all grades outside regular classrooms.

CONCLUSION

The discrimination questioning this case arises from the LISD's proposal to modify the current desegregation plan. This Court must examine the proposed modification to determine whether or not it is discriminatory and in violation of the constitutional command to desegregate the schools. However, this does not mean that every school in the district must always show a racial composition of the system as a whole. Swann v. Board of Education, 402 U.S. 1, 24 (1971).

> [T]he existence of some small number of one-race, or virtually one-race

> schools within a district is not in and of itself the mark of a system that still practices segregation by law. Id. at 26

Over the past twenty-one years, this Court has found the following schools to be de jure segregated: Bozeman, Guadalupe, Iles, Mahon, Martin, Posey, Sanders, and Wheatley Elementary Schools;Struggs and Matthews Junior High Schools; and Dunbar High School. In 1988, the LISD was declared to be unitary as to not only the above listed schools, but as to all schools in the district.

Over the history of this case,the Court has basically used a mathematical formula of 70%-30% to determine whether a particular school has a racial balance percentage of 70% or more minority to identify it as a minority identifiable school. Other courts have used higher percentages to determine whether or not a school is a one-race school. See Board of Educ. of

Oklahoma City P. Sch. v. Dowell, ____ U.S. ____, 111 S. Ct. 630 (1991) (90%); Flax v. Potts, 915 F.2d 155 (5th Cir. 1990) (80%); Davis v.East Baton Rouge Parish School Bd., 721 F.2d 1425 (5th Cir. 1983) (90%); Singleton v. Jackson Mun. Separate School Dist., 541 F.Supp. 904 (S.D. Miss. 1981) (90%); Riddick v. School Bd., 784 F.2d 521 (4th Cir.) cert. denied, 479 U.S. 938) (1986) (less than 30% or more than 70%). As the Supreme Court stated in Swann, supra at 25, "the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement."

The record in this case shows that in 1977 there was a total of eleven (11) schools in the District racially identifiable as minority schools, and which were the remaining vestiges of discrimination against minorities. [See Appendix A, pages

1-3] In reaching this finding in 1977[15], the Court found that the LISD had a policy prior to 1955 of gerrymandering the boundary liens of all Black schools and the Guadalupe Mexican-American school, which policy evidenced a segregative intent on the part of the LISD. Further segregative actions consisted of increasing the capacities at certain schools coupled with a failure to adjust boundary lines to integrate those schools and increasing capacities at already over-crowded Anglo schools rather than assigning Anglos to minority schools.

The actions of the LISD since 1978, in its attempt to eradicate vestiges of past discrimination, resulted in statistics showing that by the school year 1987-

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15 See United States v. Lubbock Independent Sch., 455 F.Supp. 1223 (N.D. Tex. 1978)

1988, of those eleven (11) schools racially identifiable as minority schools resulting from past discrimination, only one of the eleven had a minority enrollment of more than 70% minority, that being Dunbar High Schools.

The use of magnet programs, allowance of majority to minority transfers, expenditures and improvements at minority schools, assignment of faculty and staff, and utilization of mandatory transportation have resulted in desegregation of the LISD school system. Although statistics are not alone determinative of a school district's eligibility for unitary status, the statistics in this case do show and establish that out of the eleven de jure segregated schools found to have existed in 1978, by the use of all tools to accomplish unitary status, today only one such racially identifiable

minority school has a minority enrollment of 70% or more. The proposed LISD plan is targeted to continue to use all tools available to reduce racially identifiable minority schools.

Attached hereto as Appendix C, is a chart of all of the schools in the LISD school system since 1970, which shows the minority enrollments of each school for the school years 1969-70 (when this suit was filed); 1977-78 (when additional schools were found to be the result of de jure segregation); 1987-88 (when unitary status was declared); 1990-91 (the current enrollment) and the projected enrollment when the proposed plan is fully implemented.

The decrease in the number of racially identifiable schools in the LISD is largely the result of magnet programs academically enriched programs, and

majority to minority transfers. These changes and modification were administered and carried out by the LISD in good faith cooperation, in a non-discriminatory manner, and in accordance with the Decrees and Orders of this Court.

The record in this case establishes that the desegregation efforts have been successful and that desegregation has been reached to the extent practicable.

The LISD was declared to have achieved unitary status on May 3, 1988, and it is from that point in time that the Court review the proposed modification to determine if it creates resegregation in whole or in part. If resegregation is found, then the Court must determine if such was brought about by unconstitutional actions or segregative intent on the part of the LISD. As to those schools which have been declared to be de jure segregated, none of

those schools are shown to be resegregated under the proposed modification. Although, it is recognized that the elimination of mandatory transportation for the First, Second, and Six Grades, will result in racially identifiable grades in the schools affected by mandatory transportation, the campuses, as a whole, will not be racially identifiable.

The Court finds that the record in this case, the pleadings, evidence, testimony, and argument of counsel do not establish or show, in any manner,that the racial composition, if any, under the proposed modification, results from the present or past discriminatory acts on the part of the LISD, its administrators, and Board of Trustees. Any findings of past discrimination have been cured by the present plan of desegregation; and the proposed modification, together with

amendments thereto, will not result in resegregation of the Lubbock Independent Schools.

The Court finds, based upon a preponderance of the evidence, that the LISD, its administrators and Board of Trustees, has acted in good faith with a cooperative attitude in complying with the desegregation plan and other mandates contained in the various Consent Decrees and Court Orders. Further, there has been no evidence of discriminatory intent on the part of the LISD to resegregate the school district; and in fact, the evidence before the Court establishes that segregation has been rooted out of the LISD school system and vestiges of past discrimination have been eliminated to the extent practicable.

In view of the findings and conclusions reached in this memorandum, based upon a preponderance of the evidence, this

Court, in the exercise of its equitable powers, finds that the plans of desegregation implemented by the LISD pursuant to Orders of this Court in the intervening period since the case was filed in 1970, have been successful in the goal to reach and maintain unitary status. Further, the plan, as modified, is not composed in a discriminatory manner or with segregative intent to operate one-race schools, and no violation of equal protection principles is found.

Therefore, the Judgment of this Court will terminate this case, dissolve all previous Consent Decrees, Orders, injunctions, and judgments entered herein, and the Lubbock Independent School District will be operated in accordance with Tex. Ed. Code § 23.26(b) which reads as follows:

> The trustees shall have the exclusive power to manage and govern the public free schools of the district.

The proposed modification of the current desegregation plan is approved, with the specifics of the plan to be within the control and power of the LISD, keeping in mind that:

> A school district which has been released from an injunction imposing a desegregation plan no longer requires court authorization for the promulgation of policies and rules regulating matters such as assignment of students and the like, but it of course remains subject to the mandate of the Equal Protection Clause of the Fourteenth Amendment. Board of Educ. of Oklahoma City P. Sch. v. Dowell, 111 S. Ct. at 638.

Judgment shall be entered accordingly.

The Clerk shall furnish a copy hereof to all attorneys of record.

Dated September 18, 1991.

/s/ Halbert O. Woodward
HALBERT O. WOODWARD
Senior United States
District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-7252

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

TEXAS EDUCATION AGENCY (LUBBOCK INDEPENDENT SCHOOL DISTRICT), et al.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

MOTION OF THE UNITED STATES FOR VOLUNTARY DISMISSAL

The United States, appellant herein, hereby moves to dismiss this appeal

pursuant to Fed. R. App. P. 42(b). No costs have been incurred.

Respectfully submitted,

MARVIN COLLINS
United States Attorney

JOHN R. DUNNE
Assistant Attorney General

/s/ Rebecca K. Troth
DENNIS J. DIMSEY
REBECCA K. TROTH
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035

CERTIFICATE OF SERVICE

I certify that on this 17th day of January 1992, one copy of the foregoing Motion of the United States for Voluntary

Dismissal was mailed by first class mail to the following addresses:

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/s/ Rebecca K. Troth
REBECCA K. TROTH
Attorney

ENTRY OF DISMISSAL

Pursuant to the foregoing motion of appellant, Rule 42, FRAP, and Rule 42.1 of this court, the above referenced appeal was duly entered dismissed this 21st day of January 1992.

GILBERT F. GANUCHEAU
Clerk of the United States Court
of Appeals for the Fifth Circuit

By /s/ Susan Vaughn /smb
Deputy Clerk
FOR THE COURT - BY DIRECTION

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ M. Tomeny
Deputy
New Orleans, Louisiana March 13, 1992

APPENDIX D

United States Court of Appeals
Fifth Circuit
Office of the Clerk

Gilbert F. Ganucheau, Clerk
Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

February 4, 1992

Ms. Mary Alice McLarty
Attorney at Law
1116 Broadway, Ste C
Lubbock, TX 79401

No. 91-7252 USA v. The Texas Education Agency, Et Al.

Dear Ms. McLarty:

Receipt is acknowledged of your letter dated January 30, 1992, together with your motion and brief for an order staying proceedings on appeal.

This is to advise that the above cause was dismissed by the Clerk for the Court on motion of appellant on January 21, 1992. Therefore, this Court has no jurisdiction to entertain the relief that you are requesting and your motion to stay further

proceedings is being returned herewith unfiled.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By /s/ Susan Vaughn
Susan Vaughn
Case Manager

SV:lmc
encls.
cc: Ms. Rebecca K. Troth
Mr. Cecil Kuhne
Mr. John Owens

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-7252

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

TEXAS EDUCATION AGENCY, (LUBBOCK INDEPENDENT SCHOOL DISTRICT), ET AL,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MOTION AND BRIEF TO INTERVENE

Comes Now, Dr. Damon Hill, Jr., Stephanie Hill, Kathyl Anderson, Sandra Salazar and Dr. Sam Spikes, and file this their Motion to Intervene and would show the Court as follows:

FACTUAL BACKGROUND

1. This is a law suit originally filed in 1970 by the United States of America acting through the Department of Justice against the Lubbock Independent School District. After extensive hearings, orders and appeals, an Order declaring unitary status was entered May 3, 1988. On March 31, 1991 Intervenors filed their original Motion to Intervene. After three days of hearings, Judge Warnick issued his findings denying intervention of right on the grounds that the Intervenors' interests were adequately are presented by the Justice Department. Intervenors then

appealed the Magistrate's decision to the District Court for the Northern District of Texas. A further appeal was filed by the Intervenors to the Fifth Circuit Court of Appeals when the District Court expressly adopted the Magistrate's findings. The Court of Appeals issued a summary denial of intervention on December 30, 1991.

DISCUSSION

1. Movants have an interest which they seek to protect in this action. Their interest cannot be adequately protected absent intervention. This Motion is timely and the Movants are not adequately represented by the existing parties.

2. The interest which the Movants seek to protect is apparent. They are all parents of school age children who reside within the Lubbock Independent School District. (R.Ex. 557 p. 12). It is apparent that these interests cannot be adequately protected

absent intervention since intervention is the only recognized appropriate method for challenging a desegregation plan.

3. This Motion is timely as it has been previously asserted at the trial court level and is now being asserted at this Court based on the status of the case at this point and time. The interest of these Movants is not adequately represented by the United States Government as evidenced by their failure to prosecute their appeal of the District Court's Order approving the desegregation plan and dissolving injunctions in this case. That evidence, reviewed in light of the requirements of the law set forth by the United States Supreme Court in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814, (1967), and further by the line of cases discussed in *Smuck v. Hobson*, 408

in Wright & Miller Federal Practice and Procedure §1908 page 508 through 513. As the case in that discussion demonstrates, the standards for intervention in this case have been satisfied notwithstanding the 5th Circuit's prior decisions in *Bush v. Viterna*, 740 F.2d 350, 354 (5th Cir. 1984) and in *Texas v. United States Dept. of Energy*, 754 F.2d 550 (5th Cir. 1985).

4. The requirements of the First Amendment right to petition the government as set forth in the United States Constitution require liberal intervention as embodied in the 1966 amendment to F.R.C.P. 24, and as interpreted by the United States Supreme Court in *Cascade, supra.*

5. The procedural impediments established by the *Bush v. Viterna* case and the *Texas v. United States Dept. of Energy*

case are not authorized by the First Amendment of the United States Constitution, the express language of F.R.C.P. 24 and the interpretations mandated by the United States Supreme Court, and the general consensus of the Courts of Appeals as set forth in the Wright & Miller encyclopedia and cases discussed therein.

WHEREFORE, premises considered, Movants respectfully request the Court grant Movants request to intervene at this stage of the proceedings to stand in the place of the United States of America in prosecuting appeal of the District Court's decision approving LISD's plan of reorganization and the Order dissolving the injunctions and dismissing the case.

Respectfully Submitted,
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/S/ Kevin Glasheen
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/S/ Mary Alice McLarty
Mary Alice McLarty
State Bar No. 13740450

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing was on this day, _____, served on the adverse party by mailing a copy of same to the opposing counsel of record, addressed as follows:

Rebecca Troth, Esq.
Civil Rights Division
United States Department of Justice
Washington, D.C. 20530

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Cecil Kuhne, Esq.
Crenshaw, Dupree & Milam
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/S/ Mary Alice McLarty
Mary Alice McLarty

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-7252

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

TEXAS EDUCATION AGENCY, (LUBBOCK INDEPENDENT SCHOOL DISTRICT), ET AL,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MOTION AND BRIEF TO STAY PROCEEDINGS

Comes Now, Dr. Damon Hill, Jr., Stephanie Hill, Kathyl Anderson, Sandra

Salazar and Dr. Sam Spikes, and file this their Motion and Brief for an order staying these proceedings and would show the Court as follows:

1. These Movants have sought intervention at the Trial Court level which was denied. That denial of Motion to Intervene is on appeal and was affirmed by this Court, and is pending Application of *Writ* of *Certiorari* to the Supreme Court.

2. Since the time of the original Motion to Intervene, the District Court has gone forward with these proceedings approving a desegregation plan and dissolving injunctions in this case. Those Orders were appealed by the United States of America to this Court. That appeal was terminated voluntarily by the United States. The Movants have sought intervention at the appellate stage of the proceedings by filing a new Motion to

Intervene in this Court.

3. Movants request that the Court stay these proceedings so that their rights could be adequately protected if they are granted either intervention following appeal to the United States Supreme Court of their first Motion or intervention upon their second Motion to this Court.

4. Movants request that the stay be granted on the grounds that there is a substantial likelihood that they will succeed on the merits of the case and there will be irreparable harm to their interests if the stay is not granted as the case on petition to the Supreme Court may be rendered moot. *Coleman v. Paccar*, 424 U.S. 1301, 47 L.Ed.2d 67, 96 S.Ct. 845 (1976). Further, Movants assert that granting the stay will not substantially harm the other parties and that granting the stay will serve the public interest in fair

and issue full litigation of the issues at hand. Movants therefore assert that they have complied with the requirements as required by this Court in *National Treasury Employees Union v. Von Raab*, 808 F.2d 1057 (5th Cir. 1987)

WHEREFORE, premises considered, Movants respectfully request the Court enter its Order staying further proceedings in this cause, and until such time as Movants First and Second Motion to Intervene are determined and become final.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing was on this day, _____, served on the adverse party by mailing a copy of same to the opposing counsel of record, addressed as follows:

Rebecca Troth, Esq.
Civil Rights Division
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/s/ Mary Alice McLarty
Mary Alice McLarty

(2)

No. 91-1569

Supreme Court, U.S.
FILED
APR 23 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

DR. DAMON HILL, JR., STEPHANIE HILL, KATHYL ANDERSON, SANDRA SALAZAR and DR. SAM SPIKES,

Petitioners,

vs.

TEXAS EDUCATION AGENCY (LUBBOCK INDEPENDENT SCHOOL DISTRICT), *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT LUBBOCK INDEPENDENT SCHOOL DISTRICT

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QUESTIONS PRESENTED

(1) This Court does not have jurisdiction to consider the petition for certiorari complaining of the denial of petitioners, motion to intervene in a suit which was originally filed by the United States on August 7, 1970. After the District Court's denial of petitioners' motion to intervene, petitioners did not file a motion in the Fifth Circuit Court of Appeals to stay or enjoin the hearing on respondent's motion to modify the desegregation decree pursuant to Rule 8, Federal Rules of Appellate Procedure, pending the appeal by petitioners of the denial of their motion to intervene. Respondent's motion to modify the desegregation plan has already been heard by the District Court and a final judgment rendered thereon together with an order dissolving all prior orders and injunctions and dismissing the case. Therefore, petitioners' claim of improper denial of their motion to intervene is now moot and presents no case or controversy under Article III, United States Constitution.

(2) The decision of the Fifth Circuit in *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984), is correct and is not in conflict with this Court's decision in *Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S. Ct. 630, 30 L. Ed. 2d 682 (1972) or other decisions of this Court or other circuits. To the contrary, the Fifth Circuit in *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984), cited and followed the statement of this Court in *Trbovich* with respect to the "minimal" burden of showing inadequate representation.

(3) Petitioners' contention (that the courts below erred in following cases holding that a presumption of adequate representation exists) even if assumed for purpose of argument to be correct, is not controlling of the lower courts' denial of petitioners' motion to intervene because petitioners did not even meet the "minimal" burden of showing inadequate representation by the United States and, as pointed out both by the District Court

and Fifth Circuit, there was abundant and overwhelming evidence of adequate representation by the Government over a period of some 21 years.

(4) The denial of petitioners' motion to intervene is not material because the overwhelming evidence presented in a four-day trial before the District Court supports the District Court's judgment sustaining respondent's motion to modify desegregation order, granting final unitary status to LISD dissolving all prior injunctions and orders and dismissing the case, which judgment is now final.

LIST OF PARTIES

The petitioners in this case are Dr. Damon Hill, Jr., Stephanie Hill, Kathyl Anderson, Sandra Salazar and Dr. Sam Spikes.

Respondents are the Lubbock Independent School District (Lubbock, Texas); the United States of America; and the Texas Education Agency.

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No. 91-1569

In The

Supreme Court of the United States

October Term, 1991

DR. DAMON HILL, JR., STEPHANIE HILL, KATHYL ANDERSON, SANDRA SALAZAR and DR. SAM SPIKES,

Petitioners,

vs.

TEXAS EDUCATION AGENCY (LUBBOCK INDEPENDENT SCHOOL DISTRICT), *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT LUBBOCK INDEPENDENT SCHOOL DISTRICT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES LUBBOCK INDEPENDENT SCHOOL DISTRICT (LUBBOCK, TEXAS), one of the respondents herein,

and submits its brief in opposition to petition for writ of certiorari to the United States Court of Appeals to the Fifth Circuit, and would respectfully show the following:

OPINIONS BELOW

The opinion of the United States District Court of the Northern District of Texas denying petitioners' motion to intervene is dated June 11, 1991. Such opinion, styled *United States v. Texas Educ. Agency*, is reported in 138 F.R.D. 503 (N.D. Tex. 1991).

The decision of the United States Court of Appeals for the Fifth Circuit dated December 30, 1991, affirming the judgment of the District Court, is reported at 952 F.2d 399. The opinion of the Fifth Circuit (unpublished) is contained in the Appendix at the conclusion of this brief (1a).

The District Court conducted a four-day trial on the merits of respondent's motion to modify desegregation plan and other matters on August 13-16, 1991.

The District Court rendered judgment approving such proposed modification, granting final unitary status, dissolving all prior orders and injunctions, and dismissing the case on September 18, 1991. A copy of the District Court's memorandum opinion and order is included in the appendix to the petition for writ of certiorari (B1-72).

However, petitioners did not include the six-page appendix to Judge Woodward's memorandum opinion and order dated September 18, 1991, and a copy of such appendix is included in the appendix to this brief (5a).

Likewise, petitioners did not include the judgment of the District Court dated September 18, 1991, and a copy of such

judgment is also included in the appendix to this brief (16a).

The United States filed a notice of appeal with respect to the District Court's judgment of September 18, 1991, but subsequently filed a motion for voluntary dismissal of the appeal with the Clerk of the United States Court of Appeals for the Fifth Circuit on January 21, 1992, and, pursuant to Rule 42, Federal Rules of Appellate Procedure and Rule 42.1 of the Fifth Circuit, the above-referenced appeal was duly entered dismissed on January 21, 1992. A copy of the motion for dismissal and entry of dismissal is included in the appendix hereto (18a).

STATEMENT OF JURISDICTION

Petitioners' petition for certiorari complaining of the District Court's denial of its motion to intervene is now moot and presents no present case or controversy under Article III, United States Constitution.

If the subject of an appeal has become moot, an appellate court has no jurisdiction to decide it. *In re Taylor*, 916 F.2d 1027, 1028 (1) (5th Cir. 1990); *Eitel v. Holland*, 787 F.2d 995 (1) (5th Cir. 1986), *judgment rendered on other grounds*, 798 F.2d 815 (5th Cir. 1986), *reh'g denied*, 801 F.2d 398 (5th Cir. 1986); *Laborers Intern. v. Nat. Post Off. Mail Handlers*, 880 F.2d 1388 (2) (D.C. Cir. 1989); *In re Grand Jury Subpoena Dated June 5, 1985*, 825 F.2d 231 (2) (9th Cir. 1987).

The order of the District Court of which petitioners complain denying the proposed intervention was entered on June 11, 1991.

Petitioners filed a notice of appeal and on July 18, 1991 filed a motion in the District Court to enjoin further proceedings in the case pending determination of their appeal of the denial of their motion to intervene.

The District Court entered an order denying petitioners' motion for injunction on July 19, 1991.

The hearing on the merits of the proposed desegregation plan was not scheduled to commence and did not commence until August 13, 1991.

Rule 8, Federal Rules of Appellate Procedure, provides for a motion to stay an order of the district court pending appeal.

Rule 8 even contains an emergency procedure for application to and consideration by a single judge of the court of appeals of an application for stay or injunction pending appeal in cases where the normal procedure of consideration by a panel or division of the court would be impractical due to the requirements of time.

Petitioners filed no motion whatsoever in the Court of Appeals pursuant to Rule 8, Federal Rules of Appellate Procedure, to stay or enjoin hearing on the proposed modification to the desegregation plan pending their appeal of the order of the District Court denying their motion to intervene.

The District Court conducted a four-day trial on the proposed modification and other matters from August 13-16, 1991 and entered its judgment granting such proposed modifications granting final unitary status, dissolving all prior orders and injunctions, and dismissing the case on September 18, 1991.

Such judgment is now final.

The United States of America filed a notice of appeal but subsequently filed a motion for voluntary dismissal and the appeal was entered dismissed by the Fifth Circuit on January 21, 1992 (18a).

Thus, the hearing in which petitioners sought to intervene has already been conducted, a final judgment entered, and petitioners' motion to intervene is now moot.

Furthermore, the alleged conflict between the decision of the Fifth Circuit Court of Appeals in *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984), and the decision of this Court in *Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S. Ct. 630, 30 L. Ed. 2d 682 (1972), does not exist. To the contrary, the decision of the Fifth Circuit in *Bush* cited and followed the decision of this Court in *Trbovich*.

Also, the presumption of adequate representation complained of by petitioners is not controlling with respect to the denial of petitioners' motion to intervene because the courts below specifically held in essence that petitioners did not even make a "minimal" showing of inadequate representation and there was abundant evidence of adequate representation of petitioners' interest by the United States over a period of some 21 years, as is further discussed below.

FEDERAL RULE INVOLVED

This petition for writ of certiorari involves Rule 24, Federal Rules of Civil Procedure pertaining to intervention. A verbatim copy of this Rule is contained in the appendix to this brief (21a).

STATEMENT OF THE CASE

For purpose of brevity, petitioners are sometimes referred to in this brief as "Hill" and the respondent, Lubbock Independent School District as "LISD".

This suit was originally filed by the United States against LISD and others on August 7, 1970.

On March 2, 1988 a consent decree was entered by the District Court concerning unitary status and other matters and on May 3, 1988, the District Court entered an order and findings of fact and conclusions of law in which the District Court found, *inter alia*, that LISD had eliminated all vestiges of a *de jure* segregated school system; that LISD had satisfactorily complied in all material respects with the consent decrees and orders which had been entered in the case, and that the dual school system had been dismantled and all its vestiges eliminated.

The order of May 3, 1988 provided for retention of jurisdiction by the District Court over the case for three years and specified at the conclusion of that period, the court would provide plaintiffs with an opportunity to show why the case should not be dismissed, and if such cause is not shown, the case would be dismissed with prejudice, the injunction dissolved, the judgment discharged, and jurisdiction terminated.

LISD filed a motion to modify the existing desegregation plan on February 11, 1991.

Hill filed a motion to intervene with respect to the LISD motion on March 13, 1991.

The United States Magistrate Judge (to whom the motion to intervene was assigned for hearing) conducted a hearing on the motion to intervene and heard testimony on such motion for three days. Subsequent to the hearing the Magistrate Judge in exhaustive findings, conclusions and recommendations recommended that the proposed intervention be denied.

The District Court entered an order adopting such findings, conclusions and recommendations and denied the motion to intervene. *United States v. Texas Educ. Agency*, 138 F.R.D. 503 (N.D. Tex. 1991).

The District Court in such order did grant amicus curiae status to the intervenors and such order further specifically provided:

> Accordingly, the proposed intervenors may give such input directly to the Government as they desire, and shall further be permitted to file their Amicus Curiae Brief stating their position regarding the proposed modification of the desegregation plan.

138 F.R.D. at p. 508.

Petitioners did in fact submit briefs to the District Court on the merits of the proposed modification and did fully participate as amicus curiae in the hearing on respondent's motion to modify desegregation plan. Petitioners' attorney, Mary Alice McLarty, was present throughout virtually the entire hearing (offering suggestions and advice to the United States trial attorney), as was Linda DeLeon, a member of the Board of Trustees of the LISD, who was one of the intervenors in their cause prior to 1988 and up until the District Court's order of May 3, 1988.

The District Court in its decision denying the motion to intervene noted the express provisions of Rule 24(a), Federal Rules of Civil Procedure, providing for intervention of right providing for such intervention only (1) when the statute of the United States confers an unconditional right to intervene or (2) when an applicant claims an interest relating to the transaction which is the subject to the action and the applicant is so situated that the disposition of the action may impair or impede the applicant's ability to protect that interest " . . . unless the applicant's interest is adequately represented by existing parties".

The District Court correctly held that where a party seeking intervention has the same ultimate objective as to a party to the

suit, the petitioner must demonstrate adversity of interest, collusion, or nonfeasance.

The District Court adopted the extensive findings, conclusions and recommendations of the Magistrate that there was no evidence of adversity of interest, collusion or nonfeasance on the part of the government.

The court noted, *inter alia:*

> As noted earlier, this case was initially filed by the Government in August, 1970. Over the years, numerous Orders have been entered by this Court, some over the strenuous opposition of the Government. Some Orders have been appealed. The Government has had numerous attorneys working on this case over the past 21 years. *The record in this case is replete with adequate and full representation by the Government on the issues before this Court.*

138 F.R.D. at 507. [Emphasis added.]

Such order denying intervention was affirmed by the Fifth Circuit Court of Appeals on December 30, 1991.

In its opinion, the Fifth Circuit said:

> Finally, the district court discounted the appellants' assertion that the government is guilty of nonfeasance. *The same district judge has presided over these proceedings since their inception in 1970. His opinion catalogues the diligent efforts of the government to achieve desegregation in LISD, and we give great weight*

> *to his conclusion that "[t]he Proposed Intervenors have wholly failed in showing inadequate representation on the part of the Government."*

(4a) [Emphasis added.]

As set forth under the statement pertaining to jurisdiction above, the order of the District Court denying petitioners' motion to intervene was entered on June 11, 1991.

Petitioners gave notice of appeal on July 5, 1991 and on July 10, 1991 filed a motion in the District Court to enjoin any hearing on the merits of the proposed desegregation plan pending their appeal of the District Court's order denying their motion to intervene.

The District Court entered an order denying petitioners' motion for injunction on July 17, 1991.

Petitioners did not appeal the order of the District Court denying injunction of the hearing on the merits, nor did petitioners file any motion in the Fifth Circuit pursuant to Rule 8, Federal Rules of Appellate Procedure, seeking to stay or enjoin the hearing on the LISD motion to modify desegregation plan pending their appeal of the court's denial of their motion to intervene.

The hearing on the merits of LISD'S motion to modify desegregation plan was not scheduled to commence and did not commence until August 13, 1991, which was almost one month after the District Court denied petitioners' motion to enjoin such hearing.

The District Court heard testimony for four days (August 13-16, 1991) on the merits of the proposed desegregation plan and on September 18, 1991, the District Court entered its

memorandum opinion, order, and judgment approving the proposed desegregation plan, granting final unitary status, dissolving all prior orders and injunctions, and dismissing the case (16a).

As also noted above, such judgment is now final.

On page i of the petition for writ of certiorari, petitioners make the statement that "The Justice Department has since voluntarily withdrawn from the case".

This statement is incorrect and untrue.

As discussed above, the District Court conducted a hearing on the merits of respondent's proposed motion to modify desegregation plan on August 13-16, 1991, and entered a judgment with respect thereto on September 18, 1991.

A notice of appeal was filed by the United States. The United States subsequently moved to dismiss the appeal, and the appeal was duly entered dismissed by the Clerk for the Fifth Circuit Court of Appeals on January 21, 1992 (18a). The Justice Department did not withdraw from the case.

Two other inaccurate statements made by petitioners should be noted.

On page 8, petitioners state that on January 17, 1992, the United States Justice Department filed a motion in the Fifth Circuit asking "to be withdrawn" from the appeal.

The United States did not file any motion asking to be withdrawn from the appeal. As stated above, the United States filed a motion dismissing the appeal and the appeal was entered dismissed by the Clerk for the Fifth Circuit.

On page 12, petitioners state that the Justice Department filed a brief in the Fifth Circuit spelling out four points of disagreement with the LISD's desegregation plan.

The United States did not file a brief in the Fifth Circuit.

The United States obtained an extension of time for the filing of their brief and before such time expired, filed their motion to dismiss the appeal, as referred to above.

SUMMARY OF ARGUMENT

(1) Jurisdiction.

This appeal by petitioners of the order denying their motion to intervene in the hearing on respondent's motion to modify desegregation plan in the District Court is now moot and therefore there is no case or controversy under Article III, United States Constitution.

When petitioners' motion to intervene was denied, petitioners sought a stay or injunction of the hearing on the merits in the District Court but when such motion for stay or injunction was denied, petitioners did not file a motion in the Fifth Circuit pursuant to Rule 8, Federal Rules of Appellate Procedure, to stay or enjoin the hearing on the merits pending the appeal of the denial of petitioners' motion to intervene. The hearing on the merits was conducted on August 13-16, 1991, and a judgment was rendered granting the motion to modify, granting final unitary status, dissolving the prior orders and injunctions, and dismissing the case on September 21, 1991.

(2) There is no conflict of decisions.

The decision of the Fifth Circuit Court of Appeals in *Bush*

v. Viterna, 740 F.2d 350 (5th Cir. 1984), is correct and is not in conflict with the decision of this Court in *Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S. Ct. 630, 30 L. Ed. 2d 682 (1972), which petitioners cite for the proposition that a party seeking to intervene need only make a "minimal" showing of inadequacy of representation by a present party to the suit.

The fact situation and issue before this Court in *Trbovich* is not even remotely similar to the issue in the case at bar and, in any event, the Fifth Circuit in the *Bush* case in fact cited and followed the dicta of this Court in *Trbovich* concerning a "minimal" showing for intervention. *Bush* is not in conflict with the decision of this Court in *Trbovich* or with any other decision of this Court or Circuit Court.

Likewise, the decision of the District Court and Fifth Circuit in the case at bar are not in conflict with any decision of this Court or Circuit Court.

(3) Presumption of adequate representation is immaterial.

Furthermore, petitioners' complaint that the courts below erred in following *Bush* and other cases holding that there is a presumption of adequate representation, even if assumed correct, presents no grounds for reversal of the lower courts' decision denying petitioners' motion to intervene.

As held by the District Court and Fifth Circuit, there is abundant and overwhelming evidence of adequate representation by the government of petitioners' interest for a period of over 21 years and therefore petitioners did not even make a "minimal" showing of inadequate representation by the United States.

(4) District Court's decision on the merits of the motion to modify desegregation plan is correct and is final.

Furthermore, the District Court heard four days of testimony

on respondent's motion to modify desegregation plan; there is abundant and overwhelming evidence supporting the District Court's order approving the motion to modify the plan and dismissing the case, which judgment is now final.

REASONS FOR DENYING THE WRIT

I.

JURISDICTION

As discussed above, the petitioners in this case did not attempt to stay the hearing on the merits of respondent's motion to modify desegregation order pursuant to Rule 8, Federal Rules of Appellate Procedure, pending the determination of their appeal to the Fifth Circuit of the order denying their motion to intervene.

A four-day hearing was conducted by the District Court on the motion and a judgment entered, which judgment is now final.

Therefore, petitioners' petition alleging error in the denial of its motion to intervene is now moot.

The authorities pertaining to this issue have already been discussed under the heading of Statement of Jurisdiction on pages 3-5 above and will not be repeated here.

II.

THERE IS NO CONFLICT OF DECISIONS.

Petitioners contend that the decision of the Fifth Circuit Court of Appeals in *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984), and *State of Tex. v. United States Dept. of Energy*, 754 F.2d 550

(5th Cir. 1985), are in conflict with the decisions of this Court in *Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S. Ct. 630, 30 L. Ed. 2d 682 (1972), and *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 87 S. Ct. 932, 17 L. Ed. 2d 814 (1967), which are asserted by petitioners to hold that under Rule 24, Federal Rules of Civil Procedure, as amended in 1966, the burden upon an applicant for intervention to show inadequate representation is "minimal" (Petition for Certiorari, pp. 16-17).

Contrary to petitioners' contention, the Fifth Circuit in *Bush* specifically cited and followed the statement made by this Court in *Trbovich* that the burden on the proposed intervenor to show inadequate representation should be treated as "minimal".

In *Bush*, the Fifth Circuit said:

> The requirement that an intervenor not be adequately represented by existing parties "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S. Ct. 630, 636 N. 10, 30 L.Ed.2d 686 (1972).

740 F.2d at 355.

In *State of Tex. v. United States Dept. of Energy, supra*, the Fifth Circuit noted that a presumption of adequate representation was recognized by this Court (in dictum) in *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689, 81 S. Ct. 1309, 1313, 6 L. Ed. 2d 604 (1961).

The Fifth Circuit said:

> There is a suggestion in the cases that where, as here, the existing representative in the suit is the government, there is a presumption of adequate representation which may be overcome by the intervenor only upon a showing of adversity of interest, the representative's collusion with the opposing party, or nonfeasance by the representative. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689, 81 S.Ct. 1309, 1313, 6 L.Ed.2d 604 (1961) (dictum); 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1909 at 525-29 (1972). Indeed this presumption was adopted by a panel of this court in *Baker v. Wade*, 743 F.2d 236, 241 (5th Cir.1984) (rehearing en banc pending). The utilities have made no showing of such adversity of interest, collusion or nonfeasance.

754 F.2d at 553.

Furthermore, in *State of Tex. v. United States Dept. of Energy, supra*, the Fifth Circuit did not rely on the presumption of adequate representation. The Fifth Circuit further stated:

> Presumptions aside, the utilities have articulated no reason why the government will not adequately represent their interests in the pending appeal.

Likewise, in the case at bar, neither the District Court nor the Fifth Circuit relied upon the presumption of adequate representation, and held that there was abundant evidence of proper representation of petitioners' interests by the Government over a period of some 21 years. See the specific language of the District Court and Fifth Circuit quoted on pages 8-9 above.

There are a number of cases from various Circuit Courts in the United States holding that where the ultimate objective of the government (or other party to the suit) and the proposed intervenor is identical, there is a presumption that the United States (or some other party to the suit) does in fact adequately represent the interests of the proposed intervenors. *United States v. South Bend Community School Corp.*, 632 F.2d 623, 628 (7th Cir. 1982); *United States v. South Bend Community School Corp.*, 710 F.2d 394, 395-396 (7th Cir. 1983), *cert. denied*, 466 U.S. 926; *Commonwealth of Pa. v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976), *cert. denied*, 426 U.S. 921; *United States v. City of Philadelphia*, 798 F.2d 81, 90 (3d Cir. 1986); *Meredian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 205 (7th Cir. 1982); *United States Postal Service v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978).

See also, United States v. Hooker Chemicals & Plastics, 749 F.2d 968, 985 (2) (2d Cir. 1984).

The case of *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), which petitioners also contend is in conflict with the decision of the Fifth Circuit in *Bush, inter alia*, involved a question of "interest" and "standing" and did not involve the issue of whether a proposed intervenor's interest was adequately represented by an existing party to the suit.

It is clear that neither the *Bush* case nor the decision of the District Court or Fifth Circuit in the case at bar are in conflict with the decisions of this Court in *Trbovich* or *Cascade Natural Gas Corp.*, or with the *Smuck* case and other similar cases cited by petitioners.

As noted above, the Fifth Circuit in the *Bush* case in fact specifically cited and followed the *Trbovich* case.

Furthermore, the *Trbovich* case did not even involve a

remotely analogous fact situation to the case at bar.

Trbovich involved an action by the Secretary of Labor under § 402(b) of the Labor and Management Reporting and Disclosure Act of 1959 ("LMRDA") to set aside an election of officers of the United Mine Workers of America on the ground that the election was held in a manner that violated the LMRDA.

The petitioner in *Trbovich*, who was a union member, had filed the initial complaint with the Secretary of Labor and then attempted to intervene in the suit which was brought by the Secretary of Labor.

This Court discussed the legislative history and held that the statute (LMRDA), as passed, permitted not only the government but union members to file suit in connection with an election. 30 L. Ed. 2d at 693.

Thus, *Trbovich* did not involve an attempted intervention under Rule 24, Federal Rules of Civil Procedure.

Furthermore, it is interesting to note that in *Trbovich* this Court held that even though the union member was entitled to intervene, the statute which permitted such intervention (LMRDA) limited any claims made by the intervenor with respect to the invalidity of the election to those claims which had been asserted by the Secretary of Labor and this Court held that no contention could be asserted by the intervenor union member which had not been asserted by the Secretary of Labor.

The *Cascade Natural Gas Corp.* case involved the question of whether or not the proposed intervenors were "adversely affected" by the divestiture order under the Clayton Act and did not involve the issue of whether the proposed intervenors were adequately represented by an existing party to the suit.

Petitioners also refer to a split of authority as discussed in 7A Wright & Miller, *Federal Practice & Procedure*, § 1908, pp. 271-272 (1986).

This discussion in Wright & Miller pertains to various decisions with respect to what constitutes a substantial legally protectable interest and, again, these decisions do not involve the question which is in issue in the case at bar which pertains to adequacy of representation of a petitioner's interest by the United States government.

III.

PRESUMPTION OF ADEQUATE REPRESENTATION IS IMMATERIAL.

Furthermore, in the case at bar, the presumption of adequate representation and the asserted contention by petitioners that only a "minimal" showing of inadequate representation is required is not even controlling with respect to the denial of petitioners' motion to intervene because, as discussed by the courts below, there was abundant evidence supporting the finding of adequacy of representation by the United States and there is in fact no evidence of probative weight of inadequate representation.

It is well settled that in order to be entitled to intervene as a matter of right under Rule 24(a)(2), Federal Rules of Civil Procedure, the party seeking to intervene must establish each of the following:

(1) timely application;

(2) an interest by applicant in the property or transaction involved;

(3) that disposition of the matter would impair or impede applicant's ability to protect that interest; and

(4) that applicant's interest is not adequately represented by a party or parties to the suit.

Association of Professional Flight Attendants v. Gibbs, 804 F.2d 318, 320 (5th Cir. 1986).

It is fundamental that the burden of establishing each of these four factors or elements for entitlement to intervention as a matter of right is upon the proposed intervenor. *Edmondson v. State of Nebraska*, 383 F.2d 123 (4) (8th Cir. 1967); *Delaware Valley Citizens' Council v. Com. of Pa.*, 674 F.2d 970 (4) (3d Cir. 1982).

In order to meet the burden of proving that an existing party (or parties) to the suit do not adequately represent the movant's interests, the movant must establish adversity of interest or collusion on the part of the party to the suit or a failure of the party to the suit to fulfill his (its) duty. *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984); *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987); *Morgan v. McDonough*, 726 F.2d 11, 14 (1st Cir. 1984); *Liddell v. Caldwell*, 546 F.2d 768, 771 (4) (8th Cir. 1976).

In the case at bar, there is abundant evidence of adequacy of representation and absolutely no evidence of probative weight was produced by petitioners to establish adversity of interest, collusion, or failure of the United States to fulfill its duty.

It is well-settled that a mere disagreement between a party to the suit and the proposed intervenor over litigation strategy or over specific remedies or claims which should be asserted does not constitute any evidence of lack of capacity or insufficiency of representation of the proposed intervenor's interest by the federal government. *See Bradley v. Milliken*, 828 F.2d 1186, 1192

(6th Cir. 1987); *Pierson v. United States*, 71 F.R.D. 75, 80 (5) (D. Del. 1976); *Evans v. Buchanan*, 130 F.R.D. 306, 313 (3) (D. Del. 1990); *Pate v. Dade County School Bd.*, 588 F.2d 501, 503 (5th Cir. 1979), *cert. denied*, 444 U.S. 835; *United States v. Perry Cty. Bd. of Ed.*, 567 F.2d 277, 280 (5th Cir. 1978).

Obviously, in no case is it likely that there would ever be a total concurrence of position between the party to the suit and the proposed intervenor with respect to all of the aspects of the specific remedy or remedies which are the most significant and with respect to all aspects of litigation strategy.

Furthermore, it has been held that representation of a proposed intervenor's interest by a party to the suit is not inadequate merely because the proposed intervenor's motives for litigation are different from those of the existing party. *Natural Res. Defense Council v. N.Y. State D.E.C.*, 834 F.2d 60, 62 (1) (2d Cir. 1987).

In the case at bar, neither the District Court nor Fifth Circuit relied upon the presumption of adequate representation, but specifically held that there was abundant and overwhelming evidence of adequate representation by the government. In fact, there was no evidence to the contrary.

As noted above, the District Court discussed the history of the case since 1970 and concluded:

> The record in this case is replete with adequate and full representation by the government on the issues before the court.

138 F.R.D. at 507.

The Fifth Circuit in its opinion stated:

> The same district judge has presided over these proceedings since their inception in 1970. His opinion catalogues the diligent efforts of the Government to achieve desegregation in LISD, and we give great weight to his conclusion that "the Proposed Intervenors have wholly failed in showing inadequate representation on the part of the Government".

(4a).

Thus, it is clear that the petitioners in this case did not even meet the burden of establishing "minimal" evidence of inadequate representation and the issue of the presumption of adequate representation is not even relevant.

IV.

JUDGMENT ON THE MERITS IS CORRECT AND IS FINAL.

The principal objections which were asserted by petitioners to the respondent's proposed modification of its desegregation plan pertained to (1) the utilization of Dunbar High School as a junior high school, and (2) the location of the new junior high school.

It was specifically provided in the District Court's order of July 10, 1990 that the Trustees of the LISD Board had the sole discretion with respect to location of the new junior high school as long as it was located within a designated area. As stated therein, this judgment was a final judgment on all contested issues determined by such judgment.

This order was never objected to or appealed from.

Thus, any subsequent objection to the location of the junior high school as determined by the LISD was frivolous and groundless as a matter of law and could not in good faith have been asserted by the government or anyone else.

The other principal objection raised by intervenors to the proposed modification to the desegregation plan pertained to the proposal for reutilization of Dunbar High School as a junior high school. This proposal by respondent was strenuously opposed by the government throughout the entire proceeding.

The merits of intervenors' objections to the proposed modification to the desegregation plan are not relevant to this petition for writ of certiorari and all of the contentions asserted by petitioners with respect to the merits of petitioners' objections to respondent's motion to modify desegregation plan were extensively discussed in the brief of respondent, Lubbock Independent School District in the United States Court of Appeals for the Fifth Circuit (pp. 20-39).

The judgment of the District Court with respect to respondent's proposed modification of the LISD desegregation plan granting final unitary status, dissolving all prior orders and injunctions, and dismissing the case was entered on September 18, 1991 and such judgment is now final.

CONCLUSION

The petition for writ of certiorari should be denied for the reasons that (1) there is no jurisdiction, (2) there is no conflict of decisions, (3) any alleged conflict is immaterial because petitioners in this case did not even make a "minimal" showing of lack of adequate representation by the United States, and (4) judgment on the proposed modification to the LISD desegregation plan is correct and final.

WHEREFORE, respondent LISD prays that petitioners' petition for writ of certiorari be denied.

Respectfully submitted,

CECIL KUHNE
Counsel of Record
BRAD CRAWFORD
CRENSHAW, DUPREE &
MILAM, L.L.P.
Attorneys for Respondent
Lubbock Independent School
District

APPENDIX A — OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AFFIRMING JUDGMENT OF DISTRICT COURT (UNPUBLISHED)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1709
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

THE TEXAS EDUCATION AGENCY
(LUBBOCK INDEPENDENT SCHOOL DISTRICT), ET AL.,

Defendants-Appellees,

VERSUS

DR. DAMON HILL, STEPHANIE HILL, KATHYL ANDERSON, SANDRA SALAZAR, and DR. SAM SPIKES,

Appellants,

Appeal from the United States District Court
for the Northern District of Texas
(CA5-806)

(December 30, 1991)

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

Appendix A

JERRY E. SMITH, Circuit Judge:[1]

In this school desegregation case pending for more than twenty years, the appellants appeal the district court's denial of their motion to intervene as of right under Fed. R. Civ. P. 24(a)(2). The merits of the desegregation case are not before us.

Following entry of a consent decree in 1988, the Lubbock Independent School District ("LISD") on February 1, 1991, filed, pursuant to that decree, a notice of site selection for a new junior high school and a proposed reorganization plan for the school district. The appellants filed their motion to intervene on March 13, 1991. The magistrate judge conducted an extensive hearing, the transcript of which spans three volumes and 449 pages. In a comprehensive twenty-six page order, the magistrate judge determined that intervention should be denied. Following the filing of objections to the recommendation, the district court, in a twelve-page opinion, adopted the magistrate judge's findings and conclusions as its own and denied the motion to intervene. The court also granted the unsuccessful intervenors the status of amici curiae in order that they might express their views to the plaintiff, i.e., the United States, and to the court.

In *Bush v. Viterna*, 740 F.2d 350, 354 (5th Cir. 1984), we held that to intervene as a matter of right, a would-be intervenor must satisfy four requirements. We agree with the district court's conclusion that in this case, we need not consider the first three,

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1. Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

as we, like the district court, observe that the fourth requirement has not been met, i.e., that "the applicant's interest must be inadequately represented by the existing parties to the suit." *Id.*

Specifically, as the magistrate judge and district court found, the interests of the appellants are adequately represented by the government in this case. "[W]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petition must demonstrate adversity of interest, collusion, or nonfeasance." *Bush, id.* at 355.

Here, as the magistrate judge and district court noted, the primary interest of the appellants and the government is the same: to achieve a unitary school district. In school desegregation cases, intervention is denied when the interests alleged "are unrelated to desegregation and the establishment of a unitary school system." *United States v. Perry County Bd. of Educ.*, 567 F.2d 277, 280 (5th Cir. 1978). Here, the would-be intervenors complain of such things as the location of a junior high school and the decision not to use one facility as a full junior high school, but these matters are not "within the purview of the federal courts" unless they have "an impact on segregation." *Id. Accord Monteilh v. St. Landry Parish Sch. Bd.*, 848 F.2d 625, 632 (5th Cir. 1988). Moreover, "a cognizable interest in litigation does not inevitably result in a right to intervention." *Cajun Elec. Power Coop. v. Gulf States Utils.*, 940 F.2d 117, 120 (5th Cir. 1991).

Importantly, "where . . . the existing representative in the suit is the government, there is a presumption of adequate representation which may be overcome . . . only upon a showing of adversity of interest, the representative's collusion with the opposing party, or nonfeasance by the representative." *Texas v.*

Appendix A

United States Dep't of Energy, 754 F.2d 550, 553 (5th Cir. 1985). There is no adversity of interest here. As the district court noted, the government, like the appellants, has objected to certain aspects of the proposed reorganization plan, and the ultimate goal of the government is the same as appellants'. The appellants assert that collusion is shown by the fact of visits by LISD personnel to government officials in Washington, D.C. The district court properly noted, though, that such meetings were only a part of the process of negotiation, not collusion.

Finally, the district court discounted the appellants' assertion that the government is guilty of nonfeasance. The same district judge has presided over these proceedings since their inception in 1970. His opinion catalogues the diligent efforts of the government to achieve desegregation in LISD, and we give great weight to his conclusion that "[t]he Proposed Intervenors have wholly failed in showing inadequate representation on the part of the Government."

In summary, the appellants have not made a sufficient showing of inadequate representation by the government. The order denying intervention is AFFIRMED.

APPENDIX B — APPENDIX TO MEMORANDUM OPINION AND ORDER OF UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DATED SEPTEMBER 18, 1991

APPENDIX A Page 1

Elementary Schools[4]	1977-78[1] Minority Enrollment	1987-88[2] Minority Enrollment	1990-91[3] Minority Enrollment
Bozeman[5]	95.80%	59.33%	60.94%
Guadalupe	87.90%	58.12%	57.38%
Iles	99.45%	39.08%	38.50%

1. Figures taken from *United States v. Lubbock Independent School District*, 455 F. Supp. 1223, 1226 n.2 (N.D. Tex. 1978).

2. Figures taken from December 1, 1987 Report to the Court, Attachment # 2(1).

3. Figures taken from Defendant's Exhibit 60 - Proposed Desegregation Plan, Exhibit 5.

4. With the exception of Bozeman, these elementary schools were required to be desegregated by the Court's Order of January 27, 1978. *Lubbock Independent School District*, 455 F. Supp. at 1239.

5. Bozeman was ordered to be desegregated pursuant to the Court's Memorandum Opinion of April 15, 1981. At that time, its minority enrollment exceeded 95% (p.4). The July 15, 1981 Amended Plan of Desegregation to Comply with Court Order of April 15, 1981, which provided for the inclusion of Bozeman in the elementary busing plan, was approved by this Court's Order of July 20, 1981. While the April 15, 1981 Memorandum Opinion was vacated pursuant to the November 14, 1983 Mandate of the United States Court of Appeals for the Fifth Circuit, the July 20, 1981 Order has remained in full force and effect pursuant to the November 29, 1983 Consent Decree.

Appendix B

Elementary Schools	1977-78 Minority Enrollment	1987-88 Minority Enrollment	1990-91 Minority Enrollment
Mahon	88.34%	36.34%	45.86%
Martin	98.41%	62.31%	60.10%
Posey	99.18%	53.78%	55.21%
Sanders[6]	91.61%		
Wheatley	98.87%	55.94%	52.13%

APPENDIX A Page 2

Junior High Schools	1969-70[7] Minority Enrollment	1977-78[8] Minority Enrollment	1987-88[9] Minority Enrollment	1990-91[10] Minority Enrollment
Struggs JHS[11]	98.35	94.57%		

6. Sanders was closed and its students reassigned to Guadalupe pursuant to the April 18, 1978 Plan of Desegregation (p.1), which was approved, as amended, by the Court's Memorandum and Order of May 8, 1978.

7. These figures are taken from *Lubbock Independent School District*, 316 F. Supp. at 1315.

8. These figures are taken from *Lubbock Independent School District*, 455 F. Supp at 1227.

9. These figures are taken from the December 1, 1987 Report to the Court, Attachment #2(3).

10. Figures taken from Defendant's Exhibit 60 — Proposed Desegregation Plan, Exhibit 5.

11. Struggs was closed as a junior high school and added to the Dunbar (Cont'd)

Appendix B

Junior High Schools	1969-70 Minority Enrollment	1977-78 Minority Enrollment	1987-88 Minority Enrollment	1990-91 Minority Enrollment
Matthews JHS[12]		94.61%	35.00%	43.43%

(Cont'd)
campus pursuant to the April 18, 1978 Plan of Desegregation (p. 4), which was approved, as amended by the Court's Order of May 8, 1978. Its students were temporarily assigned to Atkins, Hutchinson, and Slaton Junior High Schools pursuant to the same plan (p. 5). Pursuant to the November 2, 1987 Consent Decree, the former Struggs zone students were assigned to Atkins and Slaton. The 1987-88 minority enrollment at Atkins was 36.09%. December 1, 1987 Report to the Court, Attachment #4(1). The minority enrollment at Slaton, which was 71.98% in October 1987 (December 1, 1987 Report to the Court, Attachment #4(1), was reduced to 70.66% (April 4, 1988 Agreed Record, p. 41).

12. Matthews Junior High School was ordered to be desegregated pursuant to the Court's Memorandum Opinion of April 15, 1981. At that time, its minority enrollment was approximately 94% (p.3). The July 15, 1981 Amended Plan of Desegregation to Comply with Court Order of April 15, 1981, was approved by this Court's Order of July 20, 1981. While the April 15, 1981 Memorandum Opinion was vacated pursuant to the November 14, 1983 Mandate of the United States Court of Appeals for the Fifth Circuit, the July 20, 1981 Order has remained in full force and effect pursuant to the November 29, 1983 Consent Decree.

Pursuant to the Amended Plan of Desegregation, Matthews became a 7th Grade Learning Center for all 7th grade students in the Matthews, Evans, and Mackenzie Junior High School attendance zones, and Matthews 8th and 9th grade students were assigned to Evans Junior High School. The 1987-88 minority enrollment at Evans was 37.37%. December 1, 1987 Report to the Court, Attachment #(1).

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Dunbar High School[13]

School Year	Minority Enrollment
1969-70[14]	99.15%
1977-78[15]	87.85%
1978-79[16]	58.69%
1979-80	56.84%
1980-81	58.18%

---

13. Dunbar High School was ordered to be desegregated in 1970. *Lubbock Independent School District*, 316 F. Supp. at 1315. In 1978, this Court found that the 1980 desegregation plan had not effectively integrated Dunbar and ordered the Lubbock Independent School District to submit a new plan to desegregate Dunbar. *Lubbock Independent School District*, 455 F. Supp. at 1239. Pursuant to the April 18, 1978 Plan of Desegregation (pp. 60-69), the Struggs Junior High School facility was added to Dunbar (now called Dunbar-Struggs) to form a Magnet Complex at which special courses were offered. While the minority enrollment at Dunbar-Struggs has increased in recent years, the enrollment figures demonstrate that it did become desegregated as a result of this plan.

14. These figures are taken from *Lubbock Independent School District*, 316 F. Supp. at 1312.

15. These figures are taken from *Lubbock Independent School District*, 455 F. Supp. at 1227.

16. These figures for the years 1978-79 through 1987-88 are taken from December 1, 1987 Report to the Court, Attachment #2(2)—(3).

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School Year	Minority Enrollment
1981-82	63.70%
1982-83	66.33%
1983-84	69.09%
1984-85	70.05%
1985-86	69.81%
1986-87	69.84%
1987-88	73.60%
1988-89[17]	73.01%
1989-90[18]	77.54%
1990-91[19]	81.90%

17. These figures are taken from the October 1, 1988 Report to the Court.

18. These figures are taken from the December 1, 1989 Report to the Court.

19. These figures are taken from Defendants Exhibit 60—Proposed Desegregation Plan.

Lubbock Independent School District
Lubbock, Texas

PROPOSED ELEMENTARY DESEGREGATION PLAN
1991-92

Minority students involved in the desegregation plan will be transported to a non-minority school for one year in grades three, four, and five.

Non-minority students involved in the desegregation plan will be transported to a minority school for one year in grades three, four, and five.

Summary of Minority and Non-Minority
Transported Students

Minority School Sending/ Receiving	School Receiving Minority Students	Grade	Beginning Letter of Last Name	School Sending Non-Minority Students	Grade	Beginning Letter of Last Name
Bozeman	Waters	3	A-H	Maedgen	5	A-L
		4	I-P		3	M-Z
		5	Q-Z	Waters	4	A-L
					3	M-Z
Guadalupe	Stewart	3	A-H	Haynes	4	A-L
		4	I-P		5	M-Z
		5	Q-Z	Stewart	4	A-L
					3	M-Z

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Minority School Sending/ Receiving	School Receiving Minority Students	Grade	Beginning Letter of Last Name	School Sending Non-Minority Students	Grade	Beginning Letter of Last Name
Mahon				Hardwick	4	A-L
					5	M-Z
				Rush	3	A-L
					4	M-Z
Martin	Parsons	3	A-H	Bowie	5	A-L
		4	I-P		3	M-Z
		5	Q-Z	Parsons	4	A-L
Posey	Honey	3	A-H	Honey	3	M-Z
		4	I-P		4	A-L
		5	Q-Z	Murfee	3	M-Z
					5	A-L
Wheatley	Whiteside	3	A-H	Smith	4	M-Z
		4	I-P		3	A-L
		5	Q-Z	Whiteside	5	M-Z
					3	A-L
					4	M-Z

The following schools,would no longer be required to bus neighborhood students because of the resident ethnic balance in their neighborhoods.

School	N-M Percent
Bayless	64
Overton	70
Stubbs	67
Wester	65
Wheelock	64
Williams	70

Iles and Mahon will no longer bus neighborhood students because of the small numbers. They will receive students only.

Iles, Tubbs, Ramirez, and Roscoe Wilson Elementary Schools would remain magnet schools. Majority students will continue to be assigned to Tubbs and minority students to Roscoe Wilson based on applications by parents. Both majority and minority students will continue to be assigned to Iles and Ramirez.

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APPENDIX C Page 1

LUBBOCK INDEPENDENT SCHOOL DISTRICT
MINORITY ENROLLMENT (PERCENTAGES)

	1969-70[1]	Oct.[2] 1977	Sept.[3] 1987	Oct.[4] 1990	Projected upon Implementation of Proposed Plan[5]
Elementary Schools:					
Arnett		66.29	80.74	88.84	81.
Bayless		9.24	38.0	43.81	40.
Bean		67.09	89.95	89.18	88.
Bowie		5.39	10.77	13.12	10.
Bozeman		***95.98***	***59.33***	***60.94***	***67.***
Brown		27.62	61.72	58.60	59.
Dupree		35.71	68.14	74.52	77.
Guadalupe	***100***	***87.90***	***58.13***	***57.38***	***56.***
Hardwick		7.90	32.07	30.34	37.
Harwell		84.49	92.37	94.67	95.

Note: Schools in Bold print are schools which were previously found by the Court to be *de jure* segregated schools.

1. 316 F.Supp. 1310 (N.D. Tex. 1970)

2. 600 F.2d 518, Appendix A (5th Cir. 1979)

3. December, 1987 Report to the Court

4. December, 1990 Report to the Court

5. Defendants' Trial Exhibits 58 and 62

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	1969-70	Oct. 1977	Sept. 1987	Oct. 1990	Projected upon Implementation of Proposed Plan
Haynes		1.96	12.50	15.16	13.
Hodges		38.71	76.82	79.94	80.
Honey			19.57	18.61	14.
Hunt		95.35	99.10	99.49	97.
Iles	***99.74***	***99.46***	***39.08***	***38.50***	***41.***
Jackson		85.55	94.06	97.42	97.
McWhorter		94.49	97.05	97.21	97.
Maedgen		3.66	27.90	27.87	28.
Mahon		***87.89***	***36.64***	***45.86***	***38.***
Martin	***99.32***	***98.41***	***62.31***	***60.20***	***67.***
Murfee		2.24	9.05	21.86	16.
Overton		11.91	40.07	36.79	36.
Parkway		96.84	98.77	99.26	98.
Parsons		4.81	22.58	23.71	21.
Posey	***99.23***	***99.18***	***53.78***	***55.21***	***65.***
Ramirez			***74.30***	***76.53***	***74.***
Rush		7.38	23.70	19.03	22.
Sanders	***96.14***	***91.61***			
Smith			***7.62***	***7.02***	***10.***
Southeast		75.00			
Stewart		6.08	37.57	37.26	37.
Stubbs		13.44	31.28	33.14	33.
Tubbs		94.66	70.78	61.39	64.
Waters			25.60	30.42	30.
Wester		4.56	25.54	37.09	30.
Wheatley	***100***	***98.90***	***55.94***	***52.13***	***60.***
Wheelock		14.86	36.41	46.03	38.

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	1969-70	Oct. 1977	Sept. 1987	Oct. 1990	Projected upon Implementation of Proposed Plan
Whiteside			18.77	21.85	30.
Williams		3.90	34.22	33.87	33.
Wilson		19.48	32.74	33.20	34.
Wolffarth		89.30	80.87	82.28	80.
Wright		57.86	64.66	70.43	72.
Junior High Schools					
Alderson	73.89	94.85	96.85	95.81	95.
Atkins		13.11	36.31	61.97	30.
Cavazos					70.
Dunbar					91.
Evans		2.09	36.84	38.73	15.
Hutchinson		8.49	28.34	38.19	55.
Irons				31.73	15.
MacKenzie		7.67	38.81	43.95	31.
Matthews	***76.***	***94.61***	***35.00***	***43.43***	
Slaton		55.62	72.52	60.69	55.
Wilson		8.67	35.37	37.19	23.
Struggs	***98.35***	***94.57***			
Thompson		81.76			
High Schools					
Coronado	1.00	4.80	15.04	18.79	29.
Dunbar-Struggs	***99.15***	***87.94***	***73.60***	***81.90***	
Estacado	66.09	92.11	95.29	95.90	83.
Lubbock	35.17	60.50	52.02	55.98	48.
Monterey	1.00	2.90	12.26	22.71	35.

APPENDIX C —JUDGMENT OF UNITED STATES DISTRICT COURT OF SEPTEMBER 18, 1991

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

Civil Action No. CA5-806

THE UNITED STATES OF AMERICA,

Plaintiff

v.

LUBBOCK INDEPENDENT SCHOOL DISTRICT: MIKE MOSES, Superintendent (successor to Edwin H. Irons, Superintendent); THE TEXAS EDUCATION AGENCY; and DR. J. W. EDGAR, Commissioner of Education,

Defendants.

JUDGMENT

By Memorandum Opinion and Order of even date herewith, the Court has entered its findings of fact and conclusions of law to support the Judgment herein entered.

Accordingly, it is the Judgment and Order of this Court that all orders and decrees for injunctive relief are hereby dissolved and terminated and the Lubbock Independent School District and other defendants to this suit are hereby released from same. Further, the Lubbock Independent School District will no longer require this Court's supervision or authority for its promulgation and enactment of policies and rules regulating such matters as student and faculty assignments, attendance zones, staff,

transportation, extra-curricular activities and facilities.

It is further ORDERED that the proposed modification of the current desegregation plan as submitted by the Lubbock Independent School District in its Motion to Modify the Existing Desegregation Plan, together with amendments thereto, is hereby approved and granted, with the specifics of the plan to be within the control and power of the Lubbock Independent School District, its Board of Trustees, and administrators pursuant to Tex. Ed. Code § 23.26(b).

It is the further ORDER of this Court that the complaint and all causes of action alleged herein, whether by way of complaint, cross-action or counter-claim, are dismissed with prejudice.

Costs incurred herein shall be and they are hereby adjudged against the party incurring same.

SO ORDERED.

The Clerk shall furnish a copy hereof to all attorneys.

Dated September 18th, 1991.

s/ Halbert O. Woodward
HALBERT O. WOODWARD
Senior United States District Judge

APPENDIX D — MOTION FOR VOLUNTARY DISMISSAL AND ENTRY OF DISMISSAL BY THE CLERK OF THE FIFTH CIRCUIT ON JANUARY 21, 1992

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7252

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

TEXAS EDUCATION AGENCY (LUBBOCK INDEPENDENT SCHOOL DISTRICT), et al.

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MOTION OF THE UNITED STATES FOR VOLUNTARY DISMISSAL

The United States, appellant herein, hereby moves to dismiss this appeal pursuant to Fed. R. App. P. 42(b). No costs have been incurred.

Respectfully submitted,

MARVIN COLLINS
United States Attorney
JOHN R. DUNNE
Assistant Attorney General

Appendix D

s/ Rebecca K. Troth
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CERTIFICATE OF SERVICE

I certify that on this 17th day of January 1992, one copy of the foregoing Motion of the United States for Voluntary Dismissal was mailed by first class mail to the following addresses:

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Appendix D

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s/ Rebecca K. Troth
REBECCA K. TROTH
Attorney

ENTRY OF DISMISSAL

Pursuant to the foregoing motion of appellant, Rule 42, FRAP, and Rule 42.1 of this court, the above referenced appeal was duly entered dismissed this 21st day of January, 1992.

GILBERT F. GANUCHEAU
Clerk of the United States Court
of Appeals for the Fifth Circuit

By Susan Vaughn
Deputy Clerk
FOR THE COURT — BY
DIRECTION

APPENDIX E — RULE 24, FEDERAL RULES OF CIVIL PROCEDURE

RULE 24, Intervention

(a) Intervention of Right, Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers and unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When

the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided inTitle 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff Aug. 1, 1987.)

Supreme Court, U.S.
FILED
MAY 28 1992
OFFICE OF THE CLERK

(3)

No. 91-1569

In the Supreme Court of the United States

OCTOBER TERM, 1991

DR. DAMON HILL, JR., STEPHANIE HILL, KATHYL ANDERSON, SANDRA SALAZAR, AND SAM SPIKES, PETITIONERS

v.

TEXAS EDUCATION AGENCY (LUBBOCK INDEPENDENT SCHOOL DISTRICT), ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioners' motion to intervene as of right under Fed. R. Civ. P. 24(a)(2).

2. Whether petitioners should have been allowed to intervene in the court of appeals after that court dismissed the government's appeal of the district court's order approving the Lubbock Independent School District's desegregation plan, dissolving the injunction, and dismissing the case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is unpublished, but the judgment is reported at 952 F.2d 399 (Table). The opinion of the district court (App., *infra*, 1a-11a) and the magistrate's recommendation denying intervention are reported at 138 F.R.D. 503. The district court's opinion on the merits approving the Lubbock Independent School District's reorganization plan, dissolving the injunction, and dismissing the case (Pet. App. B1-B72) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1991. The petition for a writ of certiorari was filed on March 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States filed this action in 1970 against the Texas Education Agency and the Lubbock Independent School District (LISD) alleging that defendants operated a segregated school system in violation of the Fourteenth Amendment. In 1988, after 18 years of litigation, the district court entered an order that LISD had achieved unitary status. Under that order, LISD could move to dismiss the case after three years, and the United States would have the opportunity to show cause at that time why the case should not be dismissed. Pet. App. B1-B2, B16-B17.

On February 1, 1991, LISD proposed a site for a new school and moved for approval of a new reorganization plan. The United States opposed LISD's motion. On March 13, 1991, petitioners, parents of school-age children who live in Lubbock, moved to intervene to oppose LISD's proposed plan. Pet. App. A2-A3. The magistrate conducted a three-day evidentiary hearing on petitioners' intervention motion (Pet. App. A3, B18) and recommended denial of the motion because the United States adequately represented petitioners' interest in a desegregated school system. Pet. App. A3.

The district court adopted the magistrate's recommendation because "[t]he Proposed Intervenors have wholly failed in showing inadequate representation on the part of the Government." App., *infra*, 8a; see Pet. App. A3. Finding instead that "[t]he record

in this case is replete with adequate and full representation by the Government," App., *infra*, 7a, the court held that petitioners had not overcome the presumption of adequacy of representation by the government, "and in addition thereto, the record * * * establishes by a preponderance of the evidence that the Government has in the past adequately represented the interest of the Proposed Intervenors." App., *infra*, 8a-9a. The court, however, allowed the petitioners to appear as amici curiae to express their views on the merits of LISD's reorganization plan. Pet. App. A3, B19. On September 18, 1991, after another extensive evidentiary hearing, the district court approved LISD's proposed plan, dissolved the injunction, and dismissed the case. Pet. App. B1-B72.

2. On petitioners' appeal of the order denying intervention, the Fifth Circuit rejected their claim that the district court should have allowed them to intervene as of right under Fed. R. Civ. P. 24(a)(2) because the United States did not adequately represent their interests. Pet. App. A7. The court ruled that adequacy of representation by the government is presumed unless there is a showing of adversity of interests, collusion, or nonfeasance, and affirmed the district court's factual findings that petitioners made no such showing here. Pet. App. A6. The court of appeals agreed that the government and petitioners share the same "ultimate goal" of achieving a unitary school district. Pet. App. A5-A6. The court also agreed that meetings between representatives of the United States and LISD "were only a part of the process of negotiation," Pet. App. A6-A7, and were not evidence of collusion. Finally, the Fifth Circuit noted that the "same district judge [who] has presided over these proceedings since their inception in 1970" wrote a 12-page opinion that "catalogues the

diligent efforts of the government to achieve desegregation in LISD." Pet. App. A3, A7. The court thus gave "great weight" to the trial court's conclusion that petitioners wholly failed to show that the government's representation was inadequate. Pet. App. A7.

3. On November 18, 1991, the United States noticed an appeal of the September 18, 1991, order on the merits, but moved to dismiss the appeal on January 17, 1992. Pet. App. C1-C3. The court of appeals granted the motion and dismissed the case on January 21, 1992. Pet. App. C4. Nine days later, on January 30, 1992, petitioners attempted to move in the court of appeals to intervene and to stay the proceedings pending the disposition of this petition for certiorari. Pet. App. D3-D16. The Fifth Circuit did not allow the motions to be filed, because there was no appeal pending. Pet. App. D1-D2.

ARGUMENT

The Fifth Circuit's decision affirming the denial of intervention under Fed. R. Civ. P. 24(a)(2) is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, there has been no change in circumstances that justifies reconsideration of the original denial. Accordingly, review by this Court is not warranted.

1. The court of appeals properly presumed (Pet. App. A6) that the government, the plaintiff in this school desegregation case since its inception in 1970, adequately represented petitioners' interest in an integrated school system. See, *e.g.*, *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961) (dictum); *Chiles* v. *Thornburgh*, 865 F.2d 1197, 1215 (11th Cir. 1989); *Texas* v. *United States Dep't of Energy (DOE)*, 754 F.2d 550, 553 (5th Cir. 1985);

United States v. *Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 985-986 (2d Cir. 1984); *United States* v. *South Bend Community School Corp.*, 710 F.2d 394, 396 (7th Cir. 1983), cert. denied, 466 U.S. 926 (1984); *Environmental Defense Fund, Inc.* v. *Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979). While that presumption may be rebutted by a showing of adversity of interests, collusion, or nonfeasance (Pet. App. A6; *Texas* v. *Doe*, 754 F.2d at 553), petitioners wholly failed to rebut the presumption.

Petitioners could not demonstrate any adversity of interests because their ultimate objective—desegregating the Lubbock public schools—is identical to the government's goal in this litigation. Pet. 29-30; App., *infra*, 6a; Pet. App. A5-A6. Petitioners claimed no other legally protectable interest that could be asserted in a school desegregation case in federal court. Pet. App. A5-A6; *Monteilh* v. *St. Landry Parish School Bd.*, 848 F.2d 625, 631-632 (5th Cir. 1988); *United States* v. *Perry County Bd. of Educ.*, 567 F.2d 277, 279-280 (5th Cir. 1978). The district court and the court of appeals also properly refused to attach any weight to petitioners' claim of collusion, finding that meetings between the government and LISD in which the United States expressed reservations about LISD's proposals were a normal part of the negotiation process. App., *infra*, 7a; Pet. App. A6-A7. Finally, the district court that presided over this case for more than 20 years found, and the court of appeals confirmed, that the record is "replete" with evidence of "full representation by the Government." App., *infra*, 7a; Pet. App. A7.

Petitioners do not now contend, much less demonstrate, that those findings are clearly erroneous. They argue instead that the court of appeals erred in presuming adequate representation by the United States.

Pet. 15-16. Petitioners contend that that presumption conflicts with *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972), which noted that the adequacy of representation requirement under Fed. R. Civ. P. 24(a)(2) "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Petitioners argue that the presumption also conflicts with an earlier D.C. Circuit case, *Smuck* v. *Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969), in which the court allowed parents to intervene after the school board decided not to appeal the trial court's decision that the board's administration of the public schools violated the Constitution.

The Fifth Circuit's holding does not conflict with either *Trbovich* or *Smuck* v. *Hobson*. This Court and the D.C. Circuit found that intervention was appropriate in those cases largely because the interests of the government and the applicants for intervention were not identical. *Trbovich*, 404 U.S. at 538-539; *Smuck* v. *Hobson*, 408 F.2d at 181. As the D.C. Circuit recently explained the cases, while the burden on the applicant for intervention to prove inadequacy of representation is "not onerous," citing *Trbovich*, there nevertheless is a "presumption" that when the government is a party, it will adequately represent the applicants' interests when their interests are the same. *Dimond* v. *District of Columbia*, 792 F.2d 179, 191-192 (D.C. Cir. 1986), citing *Environmental Defense Fund, Inc.* v. *Higginson*, 631 F.2d at 740. A potential conflict between the interests of the private party and the government "is sufficient to satisfy a proposed intervenor's 'minimal' burden of showing that representation of its interests by existing parties may be inadequate." 792 F.2d at 193 (citations omitted). See also *Hooker Chemicals & Plastics*

Corp., 749 F.2d at 985-986 (denying intervention because the United States' obligations did not conflict with citizens' interest in abating pollution); cf. *United States* v. *Stringfellow*, 783 F.2d 821, 827-828 (9th Cir. 1986) (rejecting *Hooker* but recognizing that the relevant inquiry is whether the private and public interests coincide), vacated on other grounds, 480 U.S. 370 (1987). In challenging the presumption here, petitioners cite no case in which the United States and the proposed intervenors shared the same objective and yet intervention was allowed. Pet. 16-22.[1]

The courts below found that petitioners and the United States shared the identical goal of desegregating the Lubbock schools, and that the United States had diligently and in good faith pursued that goal over the last 20 years. App., *infra*, 7a; Pet. App. A6-A7. As petitioners concede, mere disagreements as to strategy do not demonstrate inadequacy of representation. Pet. 26-27. Under those circumstances, the courts below did not err in presuming that the United States adequately represented petitioners' interests in a desegregated school system. In so holding, the Fifth Circuit agreed with the only other circuit

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[1] In *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), an antitrust case, this Court noted that Fed. R. Civ. P. 24 was broadened in 1966 to allow intervention when the proposed intervenor has " 'an interest' in the 'transaction which is the subject of the action.' " 386 U.S. at 135 (quoting Rule). The Court found in that case that the existing parties did not adequately represent the proposed intervenors' interests precisely because the private and public interests in divestiture were not the same. 386 U.S. at 135-136. Conversely, in *Stotts* v. *Memphis Fire Dep't*, 679 F.2d 579, 583 (6th Cir.), cert. denied, 459 U.S. 969 (1982), the court upheld the denial of intervention at least in part because the legally protectable interests of the proposed intervenors and the City were identical.

to consider intervention on the United States' side in a school desegregation case. In *United States* v. *South Bend Community School Corp.*, 710 F.2d at 396, the Seventh Circuit similarly held that unless there is collusion, bad faith, or incompetence on the part of the government, when the proposed intervenors and the United States "want[] the same thing * * * —desegregating the * * * public schools," the United States is presumed to be an adequate representative.

Even if the court of appeals had erred in presuming that the government adequately represented petitioners' interests, its affirmance of the district court's order denying intervention would have been correct. The district court did not rely exclusively on the presumption, as it concluded that "in addition" to petitioners' failure to overcome the presumption, the preponderance of the evidence demonstrated the adequacy of the United States' representation. App., *infra*, 8a-9a. The court credited none of petitioners' criticisms of the United States' litigation of the case, finding instead that "[t]he record in this case is replete with adequate and full representation by the Government on the issues before this Court." App., *infra*, 7a. Petitioners thus failed to show—under any standard—that the United States did not adequately represent their interest in desegregation.

2. On January 17, 1992, the United States moved to dismiss its appeal of the order on the merits, and the court of appeals granted that motion on January 21, 1992. Pet. App. C. Because the court had dismissed the case, it did not allow petitioners to file their subsequent motion to intervene, dated January 30, 1992. Pet. App. D. Petitioners contend that the Fifth Circuit should have allowed them to intervene to appeal the district court's order on the merits after the court of appeals dismissed the United States' appeal. Pet. 26-28.

Petitioners are incorrect that the United States' decision not to pursue an appeal constitutes "changed circumstances" justifying their intervention on appeal. Petitioners have not suggested any grounds for a successful appeal of the district court's order on the merits. They focus on the "points of disagreement" with the school district's plan and their desire to bring those factual disagreements before the Fifth Circuit. Pet. 29. They do not even allege, however, that the district court committed legal error or that any of the district court's factual determinations, set out in a lengthy opinion (Pet. App. B1-B72), were clearly erroneous. In the absence of demonstrated legal or factual error on the part of the district court, there is no basis for finding that the United States' decision not to pursue an appeal—after it had litigated the case for 20 years and appealed to the Fifth Circuit twice (Pet. App. B6-B8)—proved that the United States did not adequately represent petitioners' interests. *Spangler* v. *Pasadena City Bd. of Educ.*, 427 F.2d 1352, 1354-1355 (9th Cir. 1970), cert. denied, 402 U.S. 943 (1971); *Alleghany Corp.* v. *Kirby*, 344 F.2d 571, 574-575 (2d Cir.), cert. granted, 381 U.S. 933 (1965), cert. dismissed, 384 U.S. 28 (1966). In short, petitioners' disagreements with LISD's policy choices, which have no demonstrable effect on interests properly asserted in a school desegregation case, do not justify prolonging the litigation further.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1992

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. CA-5-806

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

TEXAS EDUCATION AGENCY (Lubbock Independent School District), Et Al., DEFENDANTS

ORDER

[Filed Jun. 11, 1991]

The above entitled action concerning segregation in the public school system of the Lubbock Independent School District (LISD) was first filed by the Department of Justice against the LISD and its trustees in August of 1970. When the LISD is referred to herein as defendant, such term will include all of the defendants who have been named as the present trustees as well as their predecessors in office, all in their official capacity.

Before the Court at this time is a motion by LISD to modify the attendance and boundary zones of various schools in the district and to consider changes in the magnet program; a motion of certain individuals to intervene in opposition to LISD's proposed modification and a motion by defendants to dismiss the proposed "Claim for Which Intervention is Sought."

Those seeking to intervene have varying interests which allow them standing to file their motion to intervene, such interest being set forth in detail in the Magistrate Judge's "Findings, Conclusions and Recommendations."

The motion by the Proposed Intervenors was referred to a Magistrate Judge with authority to conduct a hearing and file findings, conclusions and recommendations with this Court on the motion to intervene. The Magistrate Judge has filed this report and the parties have filed objections and arguments and briefs in support of and in opposition to the requested intervention. The record of the hearing before the Magistrate Judge was transcribed into three volumes consisting of 449 pages.

This Court has read and carefully considered the transcript of the hearing as well as all of the submissions of the parties. Based upon the Magistrate Judge's findings, he concluded that the motion to intervene should be denied and so recommended to this Court.

After independently considering the pleadings of the parties, the transcript of the hearing before the Magistrate Judge, and the briefs and argument of all counsel [1], the Court is of the opinion that this Order should be entered adopting and finding as correct each of the findings and conclusions of the Magistrate Judge, and they are here adopted as the findings and conclusions of this Court.

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[1] Amicus Curiae Briefs have been filed by (1) the NAACP of Lubbock; (2) the League of Women Voters of Lubbock; (3) the League of United Latin American Citizens Council #4449 and the American GI Forum of Lubbock; and (4) Ken L. Hargesheimer and other specific parties named in such Brief.

Having considered the objections to the findings and conclusions of the Magistrate Judge, the Court is of the opinion and finds that such objections are without merit and not supported by the record in this case. ACCORDINGLY, the objections by the Proposed Intervenors to the Magistrate Judge's rulings are OVERRULED AND DENIED.

As indicated, this case was originally filed over 20 years ago and the United States of America, through the Department of Justice, has remained the Plaintiff in the case and the LISD and the various individual trustees and their successors, in their official capacity, have remained as the Defendants. In addition, the Texas Education Agency was originally named as one of the parties and still remains in the case and has participated in the proceedings concerning the proposed intervention.

When this suit was originally filed, it was alleged that the LISD was operating a dual school system which discriminated against minority students. The Brief in Support of the Motion to Intervene sets forth in fairly accurate detail the history of this litigation which has lead to the point where we are today.[2]

By Order of May 2, 1988, based upon the Consent Decrees entered in this case and an Agreed Record, the operation of LISD was found and declared to be in accordance with the laws and constitutional requirements and was declared to no longer be a dual system, with the Court retaining jurisdiction for a period of not less than three years. At the conclusion of this three year period, opportunity would be given to show cause why the case should not be dismissed and the injunctions dissolved.

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[2] See Proposed Intervenor's Brief at pages 1-7

The LISD has now designated the site for the new junior high school to be built pursuant to the Consent Decree of March 2, 1988; however, instead of filing its proposed modification plan as it affects only the junior high schools brought about by the building of the new junior high school, the LISD now seeks to make numerous modifications to the existing desegregation plan. It is this proposed modification which prompted the Proposed Intervenors to file their Motion to Intervene, along with their proposed complaint in intervention, designated as their "Claim for Which Intervention is Sought." [3]

The Proposed Intervenors seek to intervene, claiming basically that (1) the LISD has violated prior Orders by failing to implement prior desegregation plans; (2) the proposed plan is "inadequate, discriminatory and resegregative; and (3) the injunctions in effect should not be dissolved.

The Proposed Intervenors seek intervention pursuant to both Fed. R. Civ. P. 24(a) (intervention as a matter of right) and 24(b) (permissive intervention).

The Magistrate Judge's "Findings, Conclusions and Recommendations," which are adopted herein by reference and made findings and conclusions of this Court, set forth the requirements for intervention of right [4] and adequately discusses the first three re-

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[3] Pursuant to Fed. R. Civ. P. 24(c)

[4] (1) The Motion for Intervention must be timely;

(2) The Movants must have an interest relating to the transaction which is the subject of the ongoing action;

(3) The Movants must be so situated the disposition of the action may as a practical matter impair or im-

quirements. Because this Court finds that the Proposed Intervenors have failed to overcome the fourth test for intervention of right, i.e. inadequate representation by the Government of the Proposed Intervenors' rights and interests, it is not necessary to discuss the other three requirements, which have been fully discussed by the Magistrate Judge.

The Fifth Circuit in *Bush v. Viterna*, 740 F.2d 350, 354 (5th Cir. 1984), found that:

> "If a would-be intervenor fails to meet any one of these requirements then it cannot intervene as a matter or right"

The test in the Fifth Circuit is that "when the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance." *Bush*, 740 F.2d at 355. *See also Kneeland v. National Collegiate Athletic Ass'n*, 806 F.2d 1285, 1287 (5th Cir. 1987) cert. denied 484 U.S. 817 (1987). Therefore, the Proposed Intervenors must show an adversity of interest on the part of the Government, collusion between the Government and the LISD, or nonfeasance on the part of the Government. This the proposed intervenors have failed to do.

Fifth Circuit precedent establishes that "the inquiry under subsection (a)(2) is a flexible one,

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pede their ability to protect their interest in the litigation; and

(4) The Movants' interest must be inadequately represented by the existing parties to the ongoing litigation.

Fed. R. Civ. P. 24(a)

> which focuses on the particular facts and circumstances surrounding each application . . . [and] intervention of right must be measured by a practical rather than technical yardstick." *U.S. v. Texas Eastern Transmission Corp.*, 923 F.2d 410, 413 (5th Cir. 1991) citing *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 841 (5th Cir. 1975), cert. denied. 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

Insofar as adversity of interest, the Proposed Intervenors have admitted that their ultimate goal is a desegregated school system. That also is the ultimate goal of the Government.

As found by the Magistrate Judge, both the Proposed Intervenors and the Government have the same ultimate objective—desegregation. The Proposed Intervenors, however, complain that because the Government is not here in Lubbock, Texas, on a day-to-day basis, it does not possess local knowledge and concerns for the issues. However, when questioned, most of the Proposed Intervenors acknowledged that they had never attempted to directly communicate their position to the Government. In fact, the Proposed Intervenors did not really seem to understand the proposed modification because most responses were to the effect that either their attorneys had that knowledge or that experts had been hired by their attorneys to analyze the proposed modification.

> A subjective comparison, however, of the conviction of defendants and intervenors is not the test for determining adequacy of representation. Adequacy can be presumed when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interests of the proposed inter-

venor. *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985) cert. denied 474 U.S. 980 (1985).

The record shows that the Government has objected to the proposed modification, in certain respects, and the Court finds that no adversity of interest has been shown.

In an attempt to show collusion between the Government and the LISD, Proposed Intervenors focused on a recent meeting where members of the LISD administration and Board of Trustees, along with LISD attorneys, traveled to Washington to meet with Government attorneys. The Court finds that this does not show collusion, but indicates a willingness on the part of the LISD and the Government to do their job. In fact, the November 2, 1987, Consent Decree requires the LISD to submit proposed modifications to the Government for approval; and then, in the event agreement cannot be reached, the parties are to then submit the dispute to the Court for resolution. That is not collusion between the parties, but an attempt to follow Court Orders, as well as ordinary negotiations in an ongoing lawsuit.

Failing in showing adversity of interest or collusion, the Proposed Intervenors must then show nonfeasance and that the Government has failed in its duty of adequate representation. As noted earlier, this case was initially filed by the Government in August, 1970. Over the years, numerous Orders have been entered by this Court, some over the strenuous opposition of the Government. Some Orders have been appealed. The Government has had numerous attorneys working on this case over the past 21 years. The record in this case is replete with adequate and full representation by the Government on the issues before this Court.

The Proposed Intervenors attempt to show that because other parties were allowed to intervene in prior proceedings and as a result thereof, a new junior high school is to be built, that this shows inadequate representation on the part of the Government. As a part of this argument, they argue that the Government's attorney failed to attend the hearing on the site location for the new junior high school. The record reflects that Franz Marshall, the Government's attorney, notified the Court in writing of the Government's position and also filed a post hearing brief. It is also noted that even one of the attorneys for the then intervenors did not appear at the hearing. The prior intervenors were adequately represented at the location hearing by their retained attorneys; therefore, it was not incumbent upon the Government attorney to represent the then intervenors' interest at that hearing. In fact, the record indicates that the Government has urged the same building location as sought by the minority interests.

The Proposed Intervenors have wholly failed in showing inadequate representation on the part of the Government. While the presumption of adequate representation may be rebutted on a "relatively minimal showing," the Proposed Intervenors "must 'produce something more than speculation as to the purported inadequacy." *League of United Latin Amer. Citizens v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989), citing *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979). The Proposed Intervenors have not overcome the presumption of adequate representation and in addition thereto, the record and testimony before this Court establishes by a preponderance of the evidence that the Government has in the past adequately represented the interest

of the Proposed Intervenors and will continue to do so in the future. Therefore, the Court finds that Proposed Intervenors are *not* entitled to intervene as a matter of right.

Once intervention of right is denied, the Court next looks to permissive intervention.

> A court may grant permissive intervention under Rule 24(b) only if three conditions are met: (1) the movant must show an independent ground for jurisdiction; (2) the motion must be timely; and (3) the movant's claim or defense and the main action must have a question of law and fact in common . . .
>
> The existence of a common question of law or fact does not automatically entitle an applicant to intervene. Rather, rule 24(b) necessarily vests "discretion in the district court to determine the fairest and most efficient method of handling a case. . . ." [citations omitted]
>
> In exercising its discretion to grant or deny permissive intervention, a court must consider whether the intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." Rule 24(b).
>
> In addition to the interests of the original parties, a court in deciding whether to permit intervention should evaluate whether the movant's "interests are adequately represented by existing parties." [Citations omitted] . . .
>
> Finally, judicial economy is a relevant consideration in deciding a motion for permissive intervention. [Citations omitted].

Venegas v. Skaggs, 867 F.2d 527, 529-531 (9th Cir. 1989) aff'd on other grounds —— U.S. ——, 110 S.Ct. 1679 (1990).

The Fifth Circuit has found that permissive intervention is discretionary with the District Court. *See Kneeland*, 806 F.2d at 1289; *U.S. v. Texas Eastern Transmission Corp.*, 923 F.2d at 413.

In addition to the three factors considered by the Magistrate Judge, i.e. (1) timeliness, (2) common facts or law, and (3) prejudice to the parties,[5] an additional factor to be considered in determining permissive intervention is "whether the intervenors' interests are adequately represented by other parties." *Kneeland*, 806 F.2d at 1289; *League of United Latin Amer. Citizens*, 884 F.2d at 189. As discussed hereinabove, the Court finds that the Proposed Intervenors have not overcome the presumption of adequate representation on the part of the Government, and therefore, denies permissive intervention. The Court also finds that prejudice to the existing parties would result if permissive intervention is allowed. Such prejudice would include delay, unnecessary costs, and reduced control over the lawsuit. *See Tasby v. Wright*, 109 F.R.D. 296 (N.D. Tex. 1985).

The Court therefore finds that the Proposed Intervenors' Motion to Intervene, with the accompanying proposed pleading setting forth the claim for which intervention is sought, both as a matter of right and with permission, should be and the same is hereby DENIED.

The Court does find that the Proposed Intervenors should be granted amicus curiae status in the case. *See Bush*, 740 F.2d at 359. Accordingly, the Proposed Intervenors may give such input directly to the Government as they desire, and shall further be permitted to file their Amicus Curiae Brief stating their position regarding the proposed modification of the

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[5] *Bush v. Viterna*, 740 F.2d at 359; Fed. R. Civ. P. 24(b).

desegregation plan. Such Brief shall be limited to 25 pages and shall be filed on or before June 20, 1991.

In addition to filing its opposition to the proposed intervention, the LISD has also filed a "Motion to Dismiss Proposed Intervention, Alternatively Motion to Disqualify Counsel, and Motion to Limit Scope of Hearing on Proposed Intervention." A Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) goes to the merits of the claim and should not be granted unless the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45 (1957). As this Court has denied intervention, the Motion of LISD to Dismiss is moot. The Court further finds that the Motion to disqualify is without merit and is therefore denied. The Magistrate Judge limited the scope of the evidentiary hearing at the time of the hearing and that limitation is affirmed by this Court.

IT IS SO ORDERED.

The Clerk shall furnish a copy hereof to all attorneys of record, including the attorneys for parties who have previously been granted amicus curiae states.

Dated June 11, 1991.

/s/ Halbert O. Woodward
HALBERT O. WOODWARD
Senior United States
District Judge

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